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IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 190.

GREEN BAY & MISSISSIPPI CANAL COMPANY,
Plaintiff in Error,

vs.

PATTEN PAPER COMPANY (LIMITED), UNION PULP COMPANY, FOX RIVER PULP & PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, MICHAEL A. HUNT, ANNA HUNT, HENRY HEWITT, JR., AUG. L. SMITH, KAUKAUNA PAPER COMPANY, AMERICAN PULP COMPANY, W. P. HEWITT, ET AL.,
Defendants in Error.

Brief on Behalf of Green Bay & Mississippi Canal Company, Plaintiff in Error, on Motion to Dismiss.

WRIT OF ERROR TO THE STATE COURT.

The federal questions are indicated in the assignments of error, numbered one to eleven inclusive (Pr. Rec., p. 8), which assignments so numbered are here referred to largely in their inverse order.

ASSIGNMENT OF ERROR NUMBER 11.

The state court was *without jurisdiction* to pass the judgment entered in the case, whereby the plaintiff in error was

deprived of its property without due process of law, in violation of the provisions of the constitution of the United States and the fourteenth amendment thereof. See assignment given at length in Printed Record, pages 12 to 15 inclusive.

Facts.

This suit was brought in the Wisconsin state court long prior to the decision of the Kaukauna case so-called (Kaukauna Water Power Company, plaintiff in error, v. Green Bay & Mississippi Canal Company, defendant in error, 142 U. S. 254), and even long prior to its decision in the state court (70 Wis. 635), although the conditions and circumstances under which it was brought in large part appear in the Kaukauna case, and with which presumably the court is familiar. At the place of controversy the Fox river is divided into three channels by two islands, and lower down the stream into four and five channels by two other islands, although only the division into three channels by Islands Nos. 4 and 3 (naming them in their down-stream order) is pertinent to the present controversy. At a short distance above the head of Island No. 4, a cross-dam had long been constructed, with an extension down the stream on the north side known as the Government Canal, and on the south side had just been constructed a canal exclusively for water-power, the South channel of the river being closed and used as a tail-race, and both canals taking water from the pond above the cross-dam. The right to draw water from this pond into the canal on the south side was the question involved in the Kaukauna case, and which was decided adversely to the right claimed by the Kaukauna Water Power Company.

At the time suit was brought the Green Bay & Mississippi Canal Company, hereinafter called "Canal Company," was using for water-power nearly one-half of the flow of the river, taking it from the dam extension or government canal on the north side, passing it through the mills of its tenants, and discharging it at or below the head of Island

No. 3, into the North channel, one of the three channels in question. And at the same time the Kaukauna Water Power Company, hereinafter called "Water Power Company," was using nearly one-half of the flow of the river on the south side, taking it from the South side canal, passing it through the mills of its tenants, and discharging it below the head of Island No. 4, into the South channel, another of the three channels in question, and used as a tail-race. The water in both of the canals mentioned stood on the same level with the water in the pond above the cross-dam mentioned, while the level of the water in the pond constructed in the Middle channel between Islands Nos. 4 and 3, and fully described in the pleadings, was nearly or quite fifteen feet lower. From the higher level of the two canals the water was discharged into the channels of the river at points below the entrance to the Middle channel, and in such way that it could not flow into the Middle channel pond. On the theory that the owners of the Middle channel, as riparian owners, were entitled to have come into that channel all waters pertaining thereto, the suit was brought, and the prayer in substance was (1) to ascertain the share or proportion of the flow of Fox river where the same passes islands numbers 3 and 4, which in a state of nature did flow and now should be permitted to flow in the *South*, *Middle* and *North* channels of said river respectively; (2) to enjoin the *Kaukauna Water Power Company* and persons and corporations claiming under it from diverting the waters of said river appurtenant to the Middle channel from the *Middle* into the South channel of said river, confirming its then use of the water there to the one-sixth part of the flow pertaining to the South channel; and (3) for *costs* against said *Kaukauna Water Power Company.* (See prayer for judgment, Pr. Rec., pp. 34, 121 and 190.)

Map (Plff. Ex. A. 1) on file and small map hereto attached give the topography of the locality, showing the situation of the islands with relation to the banks of the river, the shape and direction of the channels, location of dams, mills, etc.

The pleadings charge the titles and ownership of the several parties to the suit, and show that three of them, the Patten Paper Company (Limited), Green Bay & Mississippi Canal Company and the Kaukauna Water Power Company, are interested as riparian owners in all three of the channels, and that the Hewitts are or were interested in two of them, the North and Middle channels. The other parties to the suit for the most part are lessees under and are represented by the parties last named, having interests kindred with theirs. The *complaint was filed by the Patten Paper Company (Limited) and two other parties for and in behalf of themselves and all others interested in the Middle channel, including the Green Bay & Mississippi Canal Company.* Those interested in the Middle channel not made plaintiffs and refusing to be made plaintiffs, namely, the Canal Company and several others, were made defendants pursuant to the statute of Wisconsin, as follows:

Wis. R. S. (2 S. & B. Ann. Stats.), sec. 2604: "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; * * *"

This reason for not making these parties plaintiffs is given in paragraph 16 of the complaint. (Pr. Rec., pp. 31 and 118.) *The suit is one by all of the parties interested in the Middle channel as plaintiffs against the parties interested in the South channel as defendants, although incidentally* the parties interested in the North channel were also made defendants because affected by a partition of the water, but the right of such parties interested in the North channel to use the waters as they were then using them, and all of the waters so used, not being questioned, prayer for judgment was not made against them. Or, stating it differently, the Patten Paper Company, representing the Middle channel, brought suit against the Kaukauna Water Power Company, representing the South channel, to enjoin a diversion of water by the Kaukauna Water Power Company from the Middle

channel, the bill alleging that water pertaining to the Middle channel was diverted by the Water Power Company into the South channel, although used from the South Side Canal as above stated, but that the water *pertaining to the North channel and no more* was being used by the Green Bay & Mississippi Canal Company from the government canal (paragraphs numbered 13, 14, 15 and 16 of complaint, Pr. Rec., pp. 26, 30 and 31, and also pp. 114 and 118), and hence not making as against such company prayer for relief of any kind,—the purpose of the suit *being not to determine the respective riparian interests and ownerships* of the respective parties, but confined to the ascertainment of the relative volumes of water which should flow in the respective channels, incidentally with a view solely to securing to the Middle channel owners for use at the pond in the Middle channel the share or proportion of flow of the river pertaining to that channel, and to enjoin the Kaukauna Water Power Company from diverting such share or proportion of water therefrom. To this complaint the Hewitts did not answer, being interested only in the *North and Middle channels*, and only four answers in all were served, of which those of the Chicago & Northwestern Railway Company (Pr. Rec., p. 138) and of the Reese Pulp Company (Pr. Rec., p. 143) did not raise issues of any kind. The joint answer of the Kaukauna Water Power Company, and certain others answering with them (Pr. Rec., p. 130), takes issue as to the relative volumes of water which should flow in the respective channels (fols. 177 and 183), charges at length the respective ownerships of the several parties so answering, and denies that the Kaukauna Water Power Company had taken into its canal and thereby diverted water from the Middle channel as charged in the complaint, and alleges "*that they*" (it) "*have*" (has) "*a lawful right to take into and pass through said canal*" (below the pond of the plaintiffs) "*one half of the flow of said river*" (fol. 184). True, it refers to the Canal Company's canal on the north side of the river, and alleges that the same "is owned by the United States of America, and that the Green Bay &

Mississippi Canal Company does not own the same so far as is necessary for the maintenance or use of the same for hydraulic power or otherwise" (Pr. Rec., p. 134, fol. 184), and makes a similar allegation respecting land claimed by the Canal Company (fol. 186); but it does not base a prayer thereon or set up a counter-claim of any kind and *makes no prayer for relief whatsoever.* The fourth and only other answer, the answer of the Green Bay & Mississippi Canal Company (Pr. Rec., p. 50, and Amended Answers, pp. 64, 84), *admits the allegations of the complaint substantially as made,* denies knowledge or information sufficient to form a belief as to some of the allegations, particularly those charging the respective riparian ownerships of the respective parties, asserts its right to continue its then use of the water, and pursuant to statute sets up a cross-bill, or counter-claim as in the Wisconsin statute called, asserting the company's right to divert and use the whole flow of the river, *that is, the balance of the flow not conceded* in the complaint, and prays judgment *that the apportionment be made* (as prayed), but subject to the company's prior right of use as follows (Pr. Rec., p. 101):

"*First*, any decree to be entered in this action, determining and adjudicating what share or proportion of the flow of said Fox river where the same passes Islands Nos. 3 and 4, in township 21 north, of range 18 east, is appurtenant, and of right should be permitted to flow in the South, Middle and North channels of said river respectively, shall declare and be made subject to the right of the defendant here answering to use all of the water-power created by the said government dam on its own lands on the north side of said river or elsewhere as it shall see fit; and that the apportionment of the flow of the river, so to be made, shall be confined to such part of the river, if any, as shall not be so used and shall be permitted to flow in the channels of said river below said dam.

"And adjudging that this defendant may have such other judgment, order or relief in the premises as shall be just and equitable. And,

"*Second*, adjudging that the plaintiffs and the Kaukauna Water Power Company pay to this defendant here answering, its costs and disbursements incurred in this action."

Independently of the counter-claim or cross-bill, the only issue raised by the pleadings had respect to the relative volumes of water flowing in the respective channels for the purpose aforesaid, and the right to an injunction against the Water Power Company from diverting water from the Middle channel, and as to this issue the facts were stipulated (Pr. Rec., p. 492). So stipulated, they verify the allegations of the complaint, which allegations were (Pr. Rec., pp. 26, 114, 5th prgh.), namely: "*About five-sixths* of the flow of said river passed" * * * "through the channel north of Island Number 4, and *about one-sixth* through the channel south of said Island Number 4" (the *South channel so-called*); "*about one-third* of the flow of such river" * * * "passed through the channel between Islands Number 3 and 4" (*the Middle channel so-called*); "and *about one-half* of the flow of such river through the channel between Island Number 3 and the north shore of said river" (the *North channel so-called*); or, taking the flow of the river at say 200, and reducing these proportions to fractions of 200, there would be for the *South channel* 33⅓-200, the *Middle channel* 66⅔-200, and the *North channel* 100-200. The stipulation admits (Pr. Rec., p. 492) that the proportions of the flow of the river were: in the *South channel* 43-200, in the *Middle channel* 62-200, and in the North channel 95-200; or, had the allegations of the complaint been definite and not as in fact they were approximate, the volumes admitted vary little therefrom. In the South channel there is admitted to be about 1-20 more, in the Middle channel about 1-50 less, and in the North channel 1-40 less than the proportions alleged, but as made approximately and not definitely, there is entire agreement between the allegations made and the facts stipulated.

But the Canal Company by its answer interposing a counter-claim or cross-bill (Amended Answer II, III, etc., Pr. Rec., pp. 85–101) did therein in substance claim that, as the grantee of the state (the state acting as trustee for the United States) and of the Fox & Wisconsin Improvement Company, and

by reason of having constructed the dam improvement and north side canal or dam extension, in question, under the acts of congress and of the state legislature pertaining thereto, it acquired the ownership and right of use of the whole of the water-power created by the dam, and the works of improvement, including therein the canal or dam extension in question; and did claim that the ownership and right so asserted had in effect been confirmed to the company by the judgment of the Wisconsin supreme court in the case of Green Bay & Mississippi Canal Company against Kaukauna Water Power Company and others, reported in 70 Wis. 635, and since affirmed in this court, reported in 142 U. S. 254; and because thereof, and for relief, did pray, as aforesaid, that the apportionment of water as prayed for in the complaint be made, but as made be subject to the Canal Company's ownership and right of use as above stated; that is, that *apportionment be made of* the waste waters permitted to flow over the dam. (142 U. S., op. 282). The canal company's claim of ownership of the half flow pertaining to the north bank of the river, or the flow of the North channel, so called, being conceded and not in contention, the claim made to the whole water-power or flow of the river was an assertion of claim operative in the case only with respect to the half flow pertaining to the south bank, or the flow of the South and Middle channels, so-called, or as against the plaintiffs only the flow of the Middle channel. To this counter-claim or cross-bill, the defendants, other than those interested, as tenants or otherwise, under the Canal Company, made answer, the Hewitts answering separately, and the plaintiffs made reply, all denying the claim of ownership and right so made by the Canal Company. The issues joined in the original action as aforesaid with the issues so joined on the counter-claim or cross-bill, coming on for trial, were together tried before the superior court of Milwaukee county, and after due consideration such court did file *in the original action* its "decision in writing," stating as required by statute (Wis. R. S., 2 S. & B., sec. 2863), separately, the

facts found by the court and its conclusions of law, which, given at length in the record (Pr. Rec., pp. 191–194, and 519–522), omitting title, are as follows:

"*First.* The ownership of the lands bordering upon the rapids of the Fox river at Kaukauna was, at the time of the filing of the complaint, as alleged in the complaint.

"*Second.* The plaintiffs were, at the commencement of this action, and still are, the owners and lessees of mills situated on the Meade and Edwards power, on the Middle channel of the Fox river at Kaukauna, substantially as alleged, and which mills could not and cannot be run without water-power, and the use of which mills, with the water to which they are entitled, is of great value to the plaintiffs, as alleged, but the exact value is not found, the same being immaterial, because of the waiver of damages in this action.

"*Third.* By nature there flowed in the South channel of said river at said Kaukauna Rapids 43-200 of the whole flow of the river, and in the Middle channel 62-200 thereof, and in the North channel 95-200 thereof.

"*Fourth.* That at the commencement of this action the Kaukauna Water Power Company, by its servants, agents and lessees, diverted from the river above the head of Island No. 4, and so that the same could not pass into the Middle channel of the river, whereon plaintiffs' mills are situated, or north of Island No. 4, more than 43-200 of the flow of the river.

"*Fifth.* That the state of Wisconsin, under and by virtue of an act of the legislature of the state of Wisconsin, approved August 8, 1848, entered upon the improvement of the Fox and Wisconsin rivers and prosecuted such improvement up to some time in the year 1853, when the Fox & Wisconsin Rivers Improvement Company was incorporated and the work of improvement of those rivers turned over to that company.

"*Sixth.* That afterwards that company prosecuted the work of improvement and maintained the same as constructed by the state and by it, substantially as shown by the plaintiffs' exhibit 'A 1,' up to the time of the sale of the works of improvement to the trustees and the organization of the Green Bay & Mississippi Canal Company, when the same was turned over to that company, and that the Green Bay & Mississippi Canal Company completed said work of improvement and have since maintained the same, up to the 18th of September, 1872, when said company conveyed to the United States of America, by deed bearing date on that day, 'all and singular its (the said Green Bay

& Mississippi Canal Company's) property and rights of property to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, saving and excepting therefrom, and reserving to the said party of the first part, the following described property, rights and portions of franchises, which, in the opinion of the secretary of war and of congress, are not needed for public use, to-wit:' * * 'Second: Also (saving and reserving) all that part of the franchises of said company, namely, the water-powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired in reference to the same.'

"*Seventh.* That the Fox & Wisconsin Improvement Company, so long as it had the control of said work of improvement, leased so much of the water-power created by said dam, to be drawn from the arm of the dam or canal, as it was able to lease for the best rents thereof it could obtain. That it became and was the absolute owner by grant from the state.

"*Eighth.* That since, down to the trial of this action, the Green Bay & Mississippi Canal Company has leased all of the water-power from the pond created by said dam and said canal or arm of the dam, to be used over the water-power lots abutting on said canal, and shown on the plaintiffs' exhibit 'A 1,' which it could find customers for, at the best rent it could obtain, and at the date of the trial it was leasing, to be used from said canal, more than 2,500 horse-power of water on the north side, and was permitting the defendant, the Kaukauna Water Power Company, to use more than 2,600 horse-power on the south side, and that the water-power thus controlled and leased by it passed to it by purchase on foreclosure of mortgage, a trust deed given by the Improvement Company.

"*Ninth.* That the remainder of the flow of said river was permitted to spill over the dam and to pass down the river.

"*Tenth.* That the river below the dam is divided by islands into three channels, called respectively the South, Middle and North channels of the river.

"That 43–200 of the whole flow of the river below the dam passed in a state of nature through the South channel, and 62–200 of the whole flow passed through the Middle channel, and 95–200 of the whole flow of the river passed through the North channel.

"*And as conclusions of law,* I find that under the deed of September 18, 1872, the United States are bound to main-

tain the dam and canal so as to furnish to the Green Bay & Mississippi Canal Company all the surplus water from said pond not required for navigation, at such points on said canal as said Canal Company should desire to use the same.

"*Second.* That the maintaining of such dam and canal by the United States and supplying the water flowing therein to the Canal Company is in execution of such agreement, and that the Canal Company is entitled to use or lease to others all of the surplus water from said pond not necessary for navigation to be drawn through said canal or directly from said pond to be used for water-power, at such point or place on the canal or elsewhere as it shall see fit.

"*Third.* That the plaintiff's are entitled to judgment, that of the water permitted by the United States and the Green Bay & Mississippi Canal Company to flow in said river below the dam and above the head of Island No. 4, 43–200 thereof should of right flow down the South channel, and 157–200 thereof down the Main channel, north of Island No. 4, and that of the water so permitted to flow down the Main channel, north of Island No. 4 and above the Middle channel, 62–157 thereof should of right flow down the Middle channel and south of Island No. 3, and 95–157 thereof down the North channel, or north of Island No. 3.

"*Fourth.* That the Green Bay & Mississippi Canal Company is entitled to have and recover judgment against all the other parties in the action, that it is entitled to all the surplus water not necessary for navigation, that it is not obliged to permit any of the water of the river and the pond to flow over the dam, but may withdraw the same through the canal, extending from the pond to the slack water below the rapids, and draw and use the same from said canal wherever it may be available for water-power, which judgment shall not conclude or prejudice the Green Bay & Mississippi Canal Company from recovering against the Kaukauna Water Power Company for the use of the water it may heretofore have drawn or shall hereafter draw from said pond.

"*Fifth.* That the Kaukauna Water Power Company has no right to use, and should be enjoined from using, any water from the power which escapes over the dam that was erected and is maintained by the government, so as to lessen or impair the proportionate flow as hereinbefore determined in said Middle and North channels, of all water which so escapes.

"*Sixth.* The water-power created by the government dam and as incidental thereto is the power produced by the surplus water not used for navigation, flowing into the canal

from the pond made by the dam intercepting the water of the river; of which water-power and the surplus water created by the improvement, the Green Bay & Mississippi Canal Company is the absolute owner.

"*Seventh.* That plaintiff is not entitled to a judgment as demanded in the amended prayer of the complaint, declaring and adjudging any portion of the entire natural flow of the waters of Fox river to be appurtenant to or as of right belonging to the North, South or Middle channel of said river below the dam, excepting such water as is permitted to escape over the dam, subject to the right of the Green Bay & Mississippi Canal Company to use all the water-power, and all the surplus water of the river not required for navigation, flowing from the pond created by the government dam into the canal; and the plaintiff ought not to have judgment against the Green Bay & Mississippi Canal Company which will abridge its right to the use of the water-power and surplus water as it may deem necessary.

"*Eighth.* The defendant, the Green Bay & Mississippi Canal Company, ought to have judgment for costs upon its answer, and the plaintiff is entitled to judgment for costs against such of the defendants as are affected by the relief which by this decision it is considered entitled to.

"Let judgment be entered in accordance herewith:"

And upon which "decision in writing" judgment in the original cause was duly entered (Pr. Rec., pp. 194–196), and, omitting title, is as follows:

"Upon reading and filing the findings of fact and conclusions of law of the Honorable R. N. Austin, judge of said court, and his order for judgment herein, and upon motion of B. J. Stevens and E. Mariner, attorneys for the defendant The Green Bay & Mississippi Canal Company,

"It is hereby considered, adjudged and decreed that the defendant, The Green Bay & Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action and their successors, heirs and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used, wherever it may be available for water-power, and is

not obliged to permit any of the water from the river or pond to flow over said dam.

"And, *second*. It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company in so withdrawing and using such water.

Third. It is further considered, adjudged and decreed, as in favor of the Patten Paper Company, against all the other defendants, that all the water of the river which is permitted by the Green Bay & Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, should be, and it is hereby, divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay & Mississippi Canal Company and its successors and assigns, between and to the South, Middle and North channels of the river in the following proportions — that is to say: 43-200 part of the water so permitted to flow down the river of right should flow down the South channel; 157-200 of the whole flow of the river so permitted to flow over the dam should of right flow down the Main channel of the river, north of Island No. 4, and that of the water so permitted to flow down the Main channel of the river, north of Island No. 4 and above the Middle channel, 62-200 thereof should of right flow down the Middle channel and south of Island No. 3, and that of the water flowing down the North channel, north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the North channel and north of Island No. 3; and each of the other parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4 so as to prevent their flowing into said channels in the proportions aforesaid.

"*Fourth*. Nothing in this judgment contained shall in anywise conclude the Green Bay & Mississippi Canal Company from recovering against the Kaukauna Water Power Company compensation for water which it has heretofore drawn or shall hereafter withdraw from the pond created by said upper dam with the assent of the Green Bay & Mississippi Canal Company.

"*Fifth*. That the Green Bay & Mississippi Canal Company do have and recover of and from the Patten Paper Company (Limited), The Union Pulp Company, and The Fox River Pulp & Paper Company, plaintiffs, and the Kaukauna Water Power Company, Henry Hewitt, Jr., and

Wm. P. Hewitt, defendants, the sum of two hundred and fifty-eight and $\frac{9}{100}$ dollars as and for its costs and disbursements upon the issue made by its answer and its cross-complaint herein.

"*Sixth.* That the plaintiffs, The Patten Paper Company (Limited), The Union Pulp Company, and The Fox River Pulp & Paper Company, defendant, have and recover of and from the defendants The Kaukauna Water Power Company the sum of two hundred forty-nine and $\frac{44}{100}$ dollars as and for its costs and disbursements upon the issue made by the complaint for the partition and division of the waters of the Fox river."

From parts of this judgment three separate appeals to the supreme court were taken respectively by the plaintiffs in the original action, the Kaukauna Water Power Company and the Hewitts, and the parts of the judgment so appealed from in all of these appeals were in terms (Pr. Rec., pp. 532, 533, 535 and 536) *restricted to the parts given in favor of the Canal Company*, and to parts awarding costs resulting therefrom, and the appeals operated to vest in the supreme court jurisdiction only of the *issues raised by the* counterclaim. Says Newman, J.: "The right of this contention of the Green Bay & Mississippi Canal Company was the only question presented by these appeals." (Op. Newman, J., Pr. Rec., p. 549, line 34, and p. 586, line 24; also, recital in judgment entered thereon, p. 554, and see p. 568). Having in such case appellate jurisdiction only, the court's jurisdiction herein is restricted to that which is conferred by the notice of appeal (Wis. R. S., 2 S. & B., secs. 2405, 3049 and 3071).

Upon the hearing of these appeals, the supreme court reversed the judgment and remanded the cause with directions to enter judgment "in accordance with the opinion of this ('supreme') court." (Judgment of reversal, Pr. Rec., pp. 539, 540; op., pp. 540–546; notice of rehearing, p. 547; rehearing denied and opinion, p. 550; cause remanded, pp. 551, 552, 553.)

Upon the return of the record, the superior court of Milwaukee county, pursuant to the mandate of the supreme court, rendered its judgment (Pr. Rec., pp. 554–556) entitled

in both the *original and cross causes.* This judgment, omitting the title and paragraphs 5, 6 and 7 of minor importance, is as follows, to wit:

"A separate appeal having been taken to the supreme court of the state of Wisconsin by The Patten Paper Company, Limited, Union Pulp Company, and Fox River Pulp and Paper Company, plaintiffs in said main action, a separate appeal also having been taken by the Kaukauna Water Power Company, Mathew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline and Michael A. Hunt, defendants in said main suit, and a separate appeal also having been taken to the supreme court of the state of Wisconsin by the defendants in the main suit, Henry Hewitt, Jr., and William P. Hewitt, all of said appeals being from *the judgment rendered and entered herein on the issue joined upon the said cross-complaint* of the Green Bay & Mississippi Canal Company on the 19th day of January, 1894; and said judgment so entered in and by this court on said 19th day of January, 1894, having been reversed upon each of said separate appeals by the judgment of said supreme court; and said supreme court having remitted to this court the record and papers transmitted to said supreme court on said appeals, together with its decision, wherein, among other things, it decided and directed that this cause be, and the same is hereby, remanded to the said superior court with directions to enter judgment in accordance with the opinion of this court."

"And whereas, the judgments and *remittiturs* upon the other two appeals were in the same language, except as to the amount of costs of the supreme court taxed therein:

"*First:* Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company (Limited), Union Pulp Company, and Fox River Pulp and Paper Company against all the defendants, that all of the water of the river except that required for the purposes of navigation shall be, and is hereby divided and apportioned between and to the South, Middle and North channels of the river in the following proportions — that is to say, 43-200 thereof of right should flow down the South channel, 157-200 thereof should of right flow down the Main channel of the river north of Island No. 4, and that of the water so of right flowing down the main channel of the river north of Island No. 4, and above the Middle channel, 62-157 thereof should of right flow down the Middle channel and south of Island

No. 3, and that of the water flowing down the North channel north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the North channel and north of Island No. 3; and each of the parties to this action, their heirs, successors and assigns, *are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.*

"*Second:* Upon motion of Mess. Fish & Cary, attorneys for the said appellants, Kaukauna Water Power Company and others, and David S. Ordway, attorney for said appellants, Henry Hewitt, Jr., and William P. Hewitt, it is considered and adjudged, upon the issue joined by the cross-complaint of the defendant Green Bay & Mississippi Canal Company, and the several answers made thereto by the other parties to this action, defendants in said cross-complaint, that the water-power which was created *incidentally* by the erection of said dam at Kaukauna *is due to the gravity of the water as it falls from the crest to the foot of the dam* proper across said river, and *not to the use of the water of said river through said canal*, and that neither said state of Wisconsin nor said Green Bay & Mississippi Canal Company, as assignee of said state, ever acquired or owned any water-power upon said river at Kaukauna by reason of or as incidental to the construction and use of said canal for navigation.

"*Third:* And it is further adjudged by the court that said Green Bay & Mississippi Canal Company, its successors and assigns, shall so use the water-power, if at all, created by said dam as that all the water used for water-power or hydraulic purposes shall be returned to the stream in such a manner and at such place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river except such as is or may be necessary for navigation as it was wont to run in a state of nature without material alteration or diminution.

"*Fourth:* And it is further adjudged that the relief demanded in said cross-complaint be denied except as hereinbefore adjudged."

From this judgment of the superior court the Canal Company appealed to the supreme court, *the contention* being that the issue in the original cause had not been tried, and that the judgment was not supported by, but was against, both pleadings and proofs, and that an amendment to the

Canal Company's cross-bill should have been allowed and the case considered upon its merits. (Pr. Rec., pp. 560–569; notice of appeal, p. 571.)

Thereupon, on motion made to the supreme court in behalf of the plaintiffs (below), the Kaukauna Water Power Company et al. and the Hewitts (Pr. Rec., pp. 576, 577), the appeal so taken was dismissed. (Judgment of dismissal, Pr. Rec., p. 578, op. p. 578.)

And thereupon, while the record of the cause still remained in the supreme court, motion on behalf of the Canal Company was made to said court to set aside said order and reinstate the said appeal. (Motion, Pr. Rec., p. 591, and grounds therefor, pp. 582–591.) Which motion, entertained and considered by the court (Pr. Rec., p. 592), was by its order and judgment denied, and opinion thereon filed May 6, 1896. (Op. Pr. Rec., pp. 593, 594.) Thereupon, on such determination, the said superior court judgment so entered pursuant to the mandate of the supreme court, became the judgment of the supreme court.

(Cassoday, C. J.: "We are clearly of the opinion that a judgment entered, as this was, in substantial accordance with the mandate of this court, is in legal effect the judgment of this court." Pr. Rec., p. 580, line 21. See, also, Atherton v. Fowler et al., 91 U. S., p. 143.)

And thereupon, *while the record of said cause still remained in said supreme court, writ of error to that court was sued out from this court.*

The following is an excerpt from the opinion of the supreme court filed on the motion to reinstate appeal:

Cassoday, C. J.: * * * (Pr. Rec.. p. 593, line 41.) "*Counsel for the appellant seems to be correct in claiming that in deciding the motion to dismiss the appeal we overlooked the fact that the complaint* for the partition of the water in the river below the dam and above the head of the islands mentioned admitted that the Canal Company was then drawing one-half the flow of the river from the dam in and through its canal to a point below the head of Island No. 3, and there used or leased to others to be used as waterpower while passing from the canal down into one or more of the channels below the dam, and that the prayer of the complaint asked no restraint of such drawing and use by

the Canal Company, but simply asked an injunction against the Kaukauna Water Power Company, and that the court should determine and adjudge what share or proportion of the entire natural flow of the river was appurtenant to and of right should be permitted to flow in the South, Middle, and North channels of the river, respectively. The purpose of the action was not to contest conflicting claims to water above the dam nor such as flowed in the canal, but to partition the water which might flow in the river below the dam between the several owners thereof, as prescribed by the statutes. Ch. 203, Laws 1881, secs. 3149–3152, S. & B. A. S. See, also, secs. 3101–3148, id. The Canal Company, being a riparian owner on islands numbered three and four mentioned, was a proper and necessary party to such partition suit. Id. As such defendant it filed its cross-bill therein, and thereby claimed not only the paramount right to all the water in the river for the purposes of navigation and the surplus water-power incidental to the improvement, but also claimed the right to draw all such surplus water through the canal to any point below where it might desire, and there to use the same or lease the same to others to be used as water-power. The other parties to the action conceding that the Canal Company had such paramount right for the purposes of navigation and the paramount right to all the surplus water-power incidental to the improvement to be used at the dam or so near the dam as not to impair their just rights as riparian owners on the islands below the dam, yet denied the right of the Canal Company to use the canal as a mere head race to convey such surplus water to a point below or opposite the islands mentioned, and there create a water-power by emptying the same into the river. The determination of the issues thus joined made it the duty of the trial court and of this court to determine where or about where such surplus water-power as was merely incidental to the construction of the dam might be used or returned to the river below the dam. With the determination so made we are entirely satisfied. S. C., 90 Wis. 370; S. C., 61 N. W. Rep. 1121; S. C., 63 N. W. Rep. 1019; S. C., 66 N. W. Rep. 601. The Canal Company obtained its right to such surplus water-power merely because it was and is incidental to the improvement. Green Bay & Mississippi Canal Co. v. Kaukauna Water Power Co., 70 Wis. 635; S. C. affirmed on writ of error, 142 U. S. 254. See, also, Attorney-General v. Eau Claire, 37 Wis. 400; S. C., 40 Wis. 533; Bell v. City of Platteville, 71 Wis. 139. To hold, as contended by the Canal Company, would, to a certain extent at least, make the right of navigation incidental to the creation of the water-

power instead of the water-power being incidental to the improvement of the river for navigation. For the reasons given, the motion to vacate the order dismissing the appeal and to reinstate the same is denied, with $10 costs and clerk's fees."

By this judgment of the superior court, thus become the judgment of the supreme court, there is taken from the Canal Company and its tenants the right to draw water from the dam extension or government canal, so called, through the mills of its tenants, and discharging the same into the North channel near and *below the mouth of the Middle channel*, at the places and only places where the Canal Company and its lessees have heretofore drawn and used water, and the only places where the water can be drawn and used advantageously by the company, and to its damage running into the hundreds of thousands of dollars. On the motion to reinstate the appeal (Pr. Rec., p. 589, pp. 582–589) it was charged that the effect of this judgment was to adjudge as follows:

(*a*) "That the Canal Company must return to the stream the whole water of the river far enough above the head of Island No. 4 to enable forty-three two-hundredths thereof to flow in the South channel, and one hundred and fifty-seven two-hundredths thereof to flow in the North channel, north of Island No. 4, thereby preventing appellant from using the half of the water appurtenant to the North channel, where it was using the same when the suit was commenced, and while its right to there use the same was admitted by the pleadings and adjudged by the trial court.

(*b*) "While this court holds that the place where the appellant may use the water of the pond 'is restricted only by its duty to refrain from injuring others,' nevertheless, in disregard thereof, the judgment requires the whole water of the river to go to the head of Island No. 4, and one hundred and fifty-seven two-hundredths of it to pass through the channel on the north side of Island No. 4, although the fact was and is that the appellant was able to draw that portion of the water appurtenant to the north bank of the river from the pond through the canal, and there use it without injury to the respondents; and by reason whereof the appellant is excluded from its accustomed use of water-power appurtenant to the north half of the river, a use in the pleadings conceded by the Patten Paper Company, and alleged as a fact by the Kaukauna Paper Company.

(c) "While this court holds that it 'has assumed to determine only the general principle by which the relative rights of the parties are to be determined, and pronounced that general principle in general terms only, and that no issue was made or any judgment asked by the respondent's pleadings, nor adjudged by the trial court, as to how and where the appellant might lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank below the dam; and that the record did not furnish data by which such questions can be determined by the court; and that those questions could not be determined by the court without appeal of some kind; that those are practical questions which cannot be answered by the aid only of mere theory. Probably it cannot be satisfactorily predicted in advance of experiment just where and how the water must be returned to the stream, so as to work no injury to lower owners; and, certainly, it cannot be determined by the court without evidence of some kind.'

"Yet the judgment, after denying the Canal Company's claim, which this court held was the only issue in the case, proceeds to determine in specific terms the rights of the parties, including the Canal Company, which had not been put in issue in the pleadings, viz.: That the Canal Company, owning the pond, and owning the riparian right on the north bank of the river, was not at liberty to use those two rights in conjunction one with the other, but must use them (if at all) separately, by determining in effect that the whole flow of the channel must go into the stream below the dam, and above the head of Island No. 4, and there be divided; and

(d) "While this court determined that the record did not furnish data by which the questions how and where the appellant might lawfully use the relative proportion of the flow of the stream which was appurtenant to its banks below the dam, and that these questions could not be determined by the court without evidence of some kind, yet the court below refused to allow the pleadings to be amended so as to put these questions at issue as a foundation for evidence upon which these could be determined, and yet further, the judgment itself appears to determine these very questions so specifically that it, to use the language of the chief justice, 'seems to be as definite and certain as language can make it without fixing the limit by survey and metes and bounds.'"

The claims of ownership or title in the Canal Company shown by the pleadings and proofs in the cause, the validity of which will be considered under other assignments of

error, and *which are defeated by this judgment*, are four in number, and are as follows:

"*First claim.*—A claim as riparian owner. It appears that the company is the owner of the north bank of the river from and including the cross-dam down to the seven-acre tract, and is the owner of the undivided half of the seven-acre tract, which tract extends to a point quite a distance below the first lock. It is also the owner of undivided interests in the shores of islands Nos. 4 and 3 on the south side of the North channel, and in the shores of one or more of the other islands, thus giving to the company as riparian owner on the north side, the whole power of the north half of the river above island No. 4, and the greater part, but not the whole, of the power appurtenant to the North channel below the heads of islands Nos. 4 and 3. *This claim of ownership, therefore, is restricted to something less than the flow of the North channel, and hence, less than the half flow of the river appurtenant to the north bank.*

"*Second claim.*—A claim as absolute owner of all of the water-power down to the first lock created by the *canal improvement*, so called. The fall in the stream from the foot of the cross-dam down to the seven-acre tract is five and one-half feet, and along the seven-acre tract to a point opposite the upper lock is six feet, in all eleven and one-half feet, to which is to be added the fall at the dam. This claim to power *down as far as the lock* is precisely the same in kind as the company's title to the power at the dam, held by this court to be in the Canal Company, and extends to one-half the flow of the river, being a trifle more than *the flow appurtenant to the North channel, and is a claim of title additional to and overlapping claim No. 1.*

"*Third claim.*—A claim of right of use at the canal embankment, regarding the same as an *extension of the dam, of all of the power created by the dam*, including the canal, namely, *the whole flow of the river*, and based upon or supported by the Kaukauna cases, state and federal. Under this claim (so far as so supported), the power can be used only 'at the dam,' and hence at any point from lot 5 on the south side of the river to the upper lock on the north side of the river, the structure for the whole distance constituting the dam. But it is the power of the entire flow of the river, and so far as relates to the half flow of the river appurtenant to its north bank (chiefly the North channel), the claim is additional to and overlaps claims Nos. 1 and 2, while it is *a new and entirely independent claim to the half flow of the river appurtenant to the south bank.*

"*Fourth claim.*—A claim based upon the appropriation by the state (vicariously for the United States) of all of the

water-power of the river to be used anywhere on the company's lands or any lands it may acquire therefor at the dam, below the dam, below the lock, or anywhere on the river, the appropriation being of all of the powers created by the dams or other works of improvement. Like claim No. 3, this extends to the whole flow of the river, is a new claim as to the half flow appurtenant to the south bank, and as to the half flow appurtenant to the north bank is additional to and overlaps claims Nos. 1 and 2; but unlike claim No. 3, it is not restricted with respect to use of water-power at the dam, even though extended to the upper lock, but admits of use at the dam and elsewhere. It is apparent that the four claims differ each from each of the others. Two of these, Nos. 1 and 2, entitle the company to use, where it is now using, substantially one-half of the flow of the river, one permitting the use of a trifle more of the flow than the other. The remaining two, Nos. 3 and 4, entitle the company to use the entire flow of the river, one where it is now using the water, that is, on the dam extended, and the other anywhere on the river wheresoever the company acquires lands."

The question of the validity of only one (No. 4), possibly two (Nos. 4 and 3), of these claims was by the pleadings presented to the state court, and *this only with respect to the half flow of the river appurtenant to the south bank.* The question of the right of use by the Canal Company of the half flow *of the river appurtenant to the north bank* was not presented to the court because not raised by the issues.

These valuable property rights are taken from the company by the judgment of the supreme court in a cause in which it was without jurisdiction of the adjudged matters affecting the Canal Company, and hence were so taken without due process of law, and in violation of the fourteenth amendment to the constitution of the United States.

MR. STEVENS' ARGUMENT.

The judgment entered was not germane to the suit, and not within the scope of relief attainable thereby.

The Wisconsin Revised Statutes prescribe the form of pleadings and the scope of relief which may be given. There are, other than demurrer, three pleadings in all,—the com-

plaint, answer and reply. (Wis. R. S., 2 S. & B. secs. given below.) The material parts of sections applicable are as follows:

"Section 2645. The first pleading on the part of the plaintiff is the complaint.

Section 2646. The complaint shall contain:

1. * * *

2. A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition.

3. A demand of the *judgment to which the plaintiff supposes himself entitled.* * * *

Sec. 2655. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. *A statement of any new matter constituting a defense or counter-claim,* in ordinary and concise language, without repetition.

Sec. 2656. The counter-claim mentioned in the last section must be one existing *in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action,* and arising out of one of the following causes of action:

1. A cause of action arising out of the * * * *transaction* set forth in the complaint, as the foundation of the plaintiff's claim, or *connected with the subject of the action.*

* * * * * * * * * *

But each counter-claim shall be pleaded as such, and be so denominated, and *the answer shall contain a demand of the judgment to* which the defendant supposes *himself to be entitled* by reason of the counter-claims therein.

Sec. 2661. When the answer contains a counter-claim, the plaintiff may, within twenty days, if he do not demur thereto, *reply* to the counter-claim. *Such reply* must contain:

1. A general or specific denial of each material allegation of the counter-claim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense, in ordinary and concise language, without repetition. * * *

Sec. 2667. Every material allegation of the complaint not controverted by the answer, and every material allegation in a counter-claim, not controverted by the reply, shall for the purposes of the action be taken as true." * * *

These are the only pleadings.

"Sec. 2886. The relief granted to the plaintiff, *if there be no answer, cannot exceed that which he shall have demanded*

in his complaint; but in any other case the court may grant him any relief, *consistent with the case made by the complaint and embraced within the issue.*"

The purpose of the suit was to enjoin an alleged diversion of water and to so far effect an apportionment of the waters of the river between the North, Middle and South channels thereof as to ascertain definitely the share or proportion pertaining to the Middle channel, pursuant to sec. 3149 of Wis. R. S. (2 S. & B., sec. 3149), which so far as pertinent is as follows:

"In case of disagreement between owners of water-powers or between owners of any rights or interests therein respecting their rights as such owners," * * * "either party may bring an action in the circuit court as hereinafter provided, for a determination of any or all of such matters of disagreement or difference or for a partition of any property pertaining to such water-power held by the party bringing such action, and any other of such owners as joint tenants or tenants in common."

It was brought by the Middle channel owners, having a common interest, the plaintiffs suing in behalf of themselves and of all others interested in the Middle channel against the owners of the South and North channels for such apportionment, and against the Kaukauna Water Power Company for an injunction against such diversion. (Notice of *lis pendens*, Pr. Rec., p. 190.) At the same time it was in substance alleged that the Canal Company was interested in the North channel, and was using for power through the government canal, under claim of ownership, the *waters of the North channel and no more*, and hence, *as against such company*, there was no charge of diversion, and no prayer for relief. It will not be questioned that, in the absence of a prayer therefor, judgment against the Canal Company could not go, and could not go in favor of defendants without the aid of a cross-bill. (Hill v. Ryan Grocery Co., 78 Fed. 21; Wood v. Collins, 60 Fed. 139; Railroad Co. v. Bradley, 10 Wall. 299-303.)

The complaint, *including prayer*, is to be read in the light of the material conditions to which it relates. The waters or half flow pertaining to the north bank of the river were

at the time being used for power by the Canal Company by drawing them through the dam extension or government canal, so-called, and discharging them into the North channel, near to above and below the head of Island No. 3; and the waters so discharged were capable of use for power further down stream by drawing them from the North channel and discharging them into the river below. The waters or half flow pertaining to the south bank, being the waters of the South and Middle channels, were then being used by the Water Power Company by drawing them from the south side canal and discharging them into the South channel below the entrance to the Middle channel, the South channel being closed at its entrance and used exclusively as a tail-race. The waters of both canals were on the same level with the water of the pond above the cross-dam, and fully fifteen or more feet higher than the water in the Middle channel pond between Islands Nos. 3 and 4. So much of the prayer of the complaint as respects apportionment was for a judgment (Pr. Rec., p. 121)

* * * "determining and adjudicating what share or proportion of the entire natural flow of said Fox river is appurtenant to and of right should be permitted to flow in the South, Middle and North channels of said river respectively," and which was accompanied with a further prayer for judgment "restraining (the Water Power Company, etc.) *from drawing from said Fox river above the head of Island No. 4, and passing around and below the head of said Island No. 4, and so that same shall not come into the Middle channel*" * * * "*more water*" * * * "*than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said South channel of said river,*" thus omitting from the prayer for injunction all control of waters pertaining to the South channel, and, as repeatedly heretofore said, omitting all reference to the waters pertaining to the North channel. From which it appears that the apportionment prayed was a mere incident to the relief sought, that of securing to the Middle channel the waters pertaining thereto, and that no grievance was made of the fact that the waters of the North and South channels were being drawn for use from high canals fifteen or more

feet above the level of the Middle channel pond, or of the manner in which such waters were being used. So that, qualified by the accompanying prayer, in effect asks for an apportionment only so far as necessary to determine the relative quantity of water pertaining to the Middle channel, and to secure to such channel the flow of such quantity therein, and is not to be construed as a prayer that the waters pertaining to each of the other channels shall be required to flow in such channels respectively, or that the use then made of the same should in any way be modified. It does not demand, but carefully abstains from demanding, that the waters pertaining to the South channel shall flow in the South channel, and makes no demand whatever respecting the waters of the North channel.

Beyond this there was no foundation laid for relief, and as against the Canal Company, as repeatedly hereinbefore stated, no prayer for judgment either on the part of the plaintiffs or on the part of any of the defendants; not on the part of the Hewitts, for they did not answer, nor on the part of the Water Power Company, for it made no prayer in its answer, and did not set up a counter-claim, and the answer itself asserts a claim of right in that company as riparian owner to take into its canal on the south side and pass down below the plaintiffs' Middle channel pond one-half of the flow of the river, a claim of right inconsistent with a *contention on its part* that the Canal Company did not have the right to make like use of the half flow of the river pertaining to the north bank, and so markedly inconsistent that it amounts to an admission of the right. These questions, however, are no longer open in the case, having already been adjudicated by the supreme court on demurrer. Opinion in the record (Pr. Rec., pp. 40–48). Respecting the rights of the Canal Company, the court, after quoting paragraphs 13, 14, etc., of the complaint (p. 43), say (p. 46):

"It is urged as one ground of demurrer that the complaint also states a separate cause of action against the Green Bay & Mississippi Canal Company, and for that reason the complaint is subject to the objection that several

causes of action are improperly joined. We think this contention is not sustained by the facts stated. The complaint does not state that the diversion of the water from the North channel by the Canal Company into their canal has taken any of the water from the river which was accustomed to run through the Middle channel. The *allegations in the complaint, so far as they regard the Canal Company, would not, if proved, entitle the plaintiff to any damages or relief against said company. We think the demurrer cannot be sustained upon that ground by either of the defendants.*" And further respecting the *scope* of the action and the limitation of relief to be given therein, the court say (p. 46, line 32): "The only other question is whether the Hunts were properly made parties to the action." (The Hunts were riparian owners of Island No. 2, situated below Islands Nos. 3 and 4, having no ownership whatever on Islands Nos. 3 and 4. The quantity of water passing Island No. 2 might be affected by the quantity of water passing through the Middle channel between Islands Nos. 3 and 4.) "If the only relief sought was to restrain the Kaukauna Water Power Company from diverting the water from the Middle channel in the future, it might be said that there was no reason for making the Hunts or any others except the Kaukauna Company and those claiming under them parties to the action. But that is not the only or the principal relief asked. In addition to the relief claimed against the Kaukauna Water Power Company and those claiming under them, this court is asked to settle and determine what share or portion of the flow of the water of said river where the same passes Islands 3 and 4, in township No. 21 north, of range 18 east, is appurtenant and of right should flow in the South, Middle and North channels of said river respectively. If the complaint states facts which entitle the plaintiff to this relief, and that it does is shown by the cases above cited, then it is evident that in order to settle the rights of the respective owners of the water rights in said channels, all persons interested in the water rights in said channels or in either of them are proper parties to the action. If it be urged that the *plaintiffs are only interested in having it settled as to what volume of water should of right flow in the Middle channel, the answer to that proposition is that the settlement of that right will necessarily affect the rights of the owners of the water-power in the other channels. The individual rights are so connected that one cannot be settled without affecting all the others.*"

So that under any judgment to be entered in the original cause, the Canal Company could not have been disturbed in

its enjoyment of the use of the waters of the river as it had theretofore been using them. Nor could the apportionment be carried further than to ascertain and secure to the plaintiffs the volume of water pertaining to the Middle Channel.

But the Canal Company's answer interposed a counter-claim or cross-bill setting up ownership or prior right of use *of all of the waters of the river* at the place of controversy. (Pr. Rec. 96–98.) And the question arises as to the effect upon the issues and upon the relief to be given in the cause produced by this counter-claim. This counter-claim is made as a part of the answer in which the company admits (Pr. Rec., p. 84) the allegations of the complaint to the effect *that it owns, is using and proposes to continue using* "about one-half of the flow of the river," being the half pertaining to the North channel, and is using it in such way that "it cannot pass into said Middle channel." In thus asserting the title or right *to all of the river*, the claim conceded as to the half flow pertaining to the north bank is extended to cover the balance or remainder of the river, and was properly made as broadly as the claim admitted. That is, the half flow of the river pertaining to the South and Middle channels not conceded to the Canal Company was described or covered in by such words as "all the flow of the river," "all the surplus waters not needed for navigation," etc. The half flow of the river pertaining to the North channel being conceded to the company, a claim to the whole of the river made in connection with such concession, became an assertion of claim only to the part not conceded, and is, we submit, made in language altogether apt and accurate thereto, presenting the claim in the clearest and briefest terms. These words were used not as tendering an issue as to its title to the half flow conceded, but as language definite in its reference to the half flow pertaining to the south bank or the South and Middle channels, and also descriptive of the *nature* of the claim made. That is, it claimed a prior right of use of the half pertaining to the south bank, because it claimed

the right of use of *all of the flow*. Any extension of issues broader than this, or affecting the subject-matter other than that involved in the original cause, the company's counter-claim *did not and could not make*, and possibly could not make a claim broader than had application to the waters pertaining to the Middle channel, as shown later.

The counter-claim under section 2656, above cited, must be "*a cause of action arising out of the*" * * * "*transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.*"

"A counter-claim," say the supreme court, "under these clauses of the statute, must be something which *resists or modifies the plaintiff's claim; it is in the nature of a cross-bill in equity.*" (Heckman v. Swartz, 55 Wis. 173, 174.) "The term *counter-claim* of itself imports a claim opposed to, or which qualifies or at least in some degree affects, the plaintiff's cause of action. It has been held in New York that a counter-claim to be valid must to some extent *impair, affect or* qualify the *plaintiff's right to the relief to which he would otherwise be entitled by his action.*" (Dietrich v Koch et al., 35 Wis. 618–626.

Inasmuch as the relief to which the plaintiffs are entitled is confined to an apportionment of the waters between the three channels only so far as necessary to ascertain and secure to the plaintiffs the volume of water pertaining to the Middle channel, and the fact appears that the waters used in the North channel are only the waters appurtenant to that channel, there can be no relief against such use given in the cause; and so the court clearly holds in its opinion above quoted. The claim that the apportionment made to the South and Middle channels (or possibly only the Middle channel) shall be subject to the Canal Company's ownership and prior right of use is a proper counter-claim within the rules declared, while the claim that the company also has, as against all parties, ownership and prior right of use of the waters pertaining to the North channel (and possibly the South channel), does not "impair, affect or qualify the plaintiff's right to the relief to which he will otherwise be entitled by his action;" and hence does not constitute

proper matter of counter-claim, and could not be pleaded as such, not being germane to the suit.

Revised Statutes, section 2656, cited, provides that "*the counter-claim*" * * * "*must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.*" * * * Applied to this case, this section requires the claim of the Canal Company to be one on which the Canal Company might have a several judgment against the plaintiffs. Confining the claim to the *waters of the North channel*, there could not be such a judgment, and probably not as to the South channel. The real plaintiffs in the cause are a body of persons consisting of all the parties interested in the Middle channel, against whom the Canal Company does not have a cause of action, inasmuch as to them it is of *no consequence in what way or by whom the waters of the North channel are used.* Their only interest is to secure for the Middle channel the waters pertaining to it, and these, they say in their complaint, are diverted into the South channel and not into the North channel, and that such is the fact is shown by the proofs.

Say this court, speaking of the scope of a cross-bill: "It (a cross-bill) should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross-bill constitute but one suit, so intimately are they connected together. (Ayers et al. v. Carver et al., 17 How. 591–595; Cross v. DeValle, 1 Wall. 5; Ex parte Railroad Co., 95 U. S. 221–225.) It is a proceeding to procure a complete determination of a matter already in litigation. (2) Daniell, Ch. 1549, note 2; Ayres v. Chicago, 101 U. S. op. 187.)

Many authorities are cited to the question as discussed in the following case: "It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject." * * * "A cross-bill must be confined to the subject-matter of the original bill, and cannot introduce new matters not embraced in the original bill. If it does so, the cross-bill becomes itself an orig-

inal bill, and there cannot be two original bills in the same cause." And cites from Hopkins Ch. 54, the following: "In Galatian v. Erwin, etc., the original suit was for foreclosing two mortgages. By cross-bill one of the defendants in her defense sought to impeach for fraud the title of the mortgagor, not only to the mortgaged premises, but to other lands. It was held that as a defense to the original suit the cross-bill was entirely proper, but that it *could not introduce a distinct suit relative to the other lands*, or become the foundation of a decree concerning matters not embraced in the original suit; and that no decree beyond the subjects of controversy in the original suit could be made in the cause." (Machinery Co. v. Machinery Co., 46 Fed. 851–852.) "A cross-bill can be sustained only on matters growing out of the original bill and embraced in it." (Vault Co. v. Railroad Co., 53 Fed. 850–852.) "It may not interpose new controversies between co-defendants to the original bill;" * * * "if it does so, it becomes an original bill and must be dismissed, because there cannot be two original bills in the same cause." (C. C. A. Stuart v. Hayden, 72 Fed. 402–410.)

"A cross-bill is a mere auxiliary, and any decision therein is not a final decree." Ex parte Railroad Co., 95 U. S. 221–225; 109 U. S. 168.

The prayer of the counter-claim is to the effect that the apportionment be made *as prayed in the complaint*, subject to the Canal Company's ownership and prior right of use of *all the waters of the river*. Using at the time through the government canal the flow pertaining to the North channel, without objection from or harm to the plaintiffs owning the banks of the Middle channel, the claim of right thus asserted by the Canal Company, namely, of the right of use of all of the waters of the river, was necessarily an ownership relating to the balance of the river not so used; i. e., the flow of the South and Middle channels or water pertaining to the south bank.

Section 2886, Wisconsin Revised Statutes, cited, providing that "*The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue,*" cannot operate to enlarge this prayer and authorize relief thereon, beyond the scope of the prayer itself. And this is equally true whether we

assume that the section may apply to the cross-bill as well as to the original complaint or not. For, assuming that it so applies, the section contemplates additional relief for the cross-bill plaintiff, and not for the cross-bill defendant, and this, as applied to this case, is relief *for the Canal Company*, and *not relief against it. Nor does this section* applied to both causes, that is, to the original cause with cross-bill interposed, operate to enlarge the prayer of the complaint in the original cause and authorize relief thereon beyond *its scope*, for, as already shown, it appears that the method of use and right of use of the North channel is a matter not set up in the cross-bill, *and a matter which if set up would not be germane thereto.* It would relate to a subject-matter different from that embraced in the original cause. The words "consistent with the case made by the plaintiff and embraced within the issue" have been construed.

"It is not competent to give a judgment at law when the complaint is for relief in equity." (Wrigglesworth v. Wrigglesworth, 45 Wis. 255–259; Evans et al. v. Virgin et al., 69 Wis. 148–152.) This statute (sec. 2886) was borrowed from New York. (Voor. Code, 4th ed., § 275; 1 Bliss's Code, § 1207.) "Suit for equitable relief cannot award legal relief." (Bradley v. Aldrich, 40 N. Y. (Hand), 504; Hawes v. Dobbs, 137 N. Y. 465; Dudley v. C. St. Francis, 138 N. Y. 451–460.) "While the prayer for relief in a complaint did not control, and the court could give any other relief consistent with the case made in the complaint, the judgment must be still *secundum allegata et probata;* that judgment could not be *given in direct hostility to the theory of the action and the substantial allegations of the complaint.*" (Graham v. Read, 57 N. Y. 681–683.)

Head Note: "In an action to recover an item allowed plaintiffs by an award, the defendants in their answer (by way of counter-claim) alleged, among other things, that the arbitrators exceeded their jurisdiction, that the award was void upon its face, and that it was corruptly and fraudulently made, by the procurement of the plaintiffs, and therefore void; also, that it was invalid for other reasons stated. The relief demanded was that the award be adjudged void, that the same be vacated and set aside, and the *submission be declared to be revoked*, and that the complaint be dismissed. Plaintiffs replied, denying the facts stated in the counter-claim. Plaintiffs obtained judgment sustaining the award, and for the sum claimed; this was

reversed by the general term and new trial granted. The order of general term was affirmed here (pursuant to stipulation authorizing judgment absolute in such cases, required by the New York statute), and judgment absolute ordered for defendants. Judgment of affirmance was entered on the remittitur, which also contained a clause *adjudging the contract of submission* to arbitrators, and the award to be void, and setting aside the same, and adjudging all acts and proceedings under and in pursuance of the submission and award to be void. On motion to strike out said clause, *held, that the judgment entered was too broad;* that there were no *allegations in the pleadings* showing the contract of submission to arbitration to be void, and there was no authority for adjudging the proceedings and acts done under the submission and award to be void; but that defendants were entitled to have the *award adjudged void,* and all subsequent proceedings depending solely upon it, leaving the submission to stand." (Hiscock et al. v. Harris et al., 80 N. Y. 402.)

It thus appears that if at the time of entering the first judgment, dated January 19, 1894 (Pr. Rec., p. 194), the superior court had entertained the same view of the law later announced by the supreme court, and, in place of the judgment it did enter, had then *sua sponte* entered the judgment now under review, which it subsequently did enter pursuant to the mandate of the supreme court, it would have been an act entirely without its jurisdiction — *coram non judice* — and, under authorities cited *infra*, the judgment could, if affirmed in supreme court, have been reviewed under writ of error from this court.

But the case may fall within the first paragraph of the section in question, namely, "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." To the complaint in the original action, the Hewitts and a number of the other defendants did not answer, although as hereinbefore stated other defendants did answer, and the effect of such failure to answer on the part of the Hewitts and other defendants may have been to restrict the plaintiffs to the relief prayed for in their complaint.

Where a complaint contained the averments necessary to foreclose a chattel mortgage, and all the necessary parties

were brought in, but it was brought not for foreclosure, but, as the *demand for relief showed*, to compel the application of certain moneys on the mortgage debt, *held* (by the New York court of appeals) that, where some of the defendants answered to the complaint and others made default, a judgment of foreclosure could not be sustained. (Briggs v. Oliver, 68 N. Y. 336–339.)

And further, to the point that the relief granted would have been improper even if the judgment had been entered by the superior court in the first instance, as stated: the government of the United States is the interested party affected by the way in which the waters of the North channel are being used by the Canal Company, and is not made a party to the suit. In the Kaukauna case (70 Wis. 635–659) this was deemed to be cause sufficient to induce the court to modify its opinion. Say the court:

"Because the United States is not a party to this litigation, and because the question of its rights in the works of the improvement, as affecting the plaintiff, has not been fully argued, we are constrained to so far modify the former opinion as to leave the question of the relative rights of the plaintiff and the United States in and to the dams, and other works pertaining to the Fox River Improvement, open and undetermined."

But the judgment in question was not entered by the superior court *sua sponte*, nor upon a trial, but was entered pursuant to the mandate of the supreme court, thereby becoming the judgment of the supreme court, and as such was far less within the jurisdiction of that court than even it would have been within the jurisdiction of the superior court had it therein been entered as suggested, and for the reason that *the whole case was not taken to the supreme court*, and necessarily that court did not have jurisdiction beyond that conferred by the appeals. The notices of appeal of the three appealing parties from the judgment of January 19, 1894, while in different language, are to the same effect (Pr. Rec., p. 534), and so far as material are as follows:

" * * * from *so much* of the judgment rendered by said superior court herein on the 19th day of January, 1894, in favor of said defendant, The Green Bay & Mississippi

Canal Company, and against all of the other parties to this action, as is contained in the first, second and fourth subdivisions of said judgment, and also from *so much* of the third subdivision of said judgment *as limits the division of water among the several channels in said river named in said third subdivision to so much of the water of said river as is or shall be permitted* by said Green Bay & Mississippi Canal Company to flow over the upper dam or into the river above Island No. Four so as to pass down the river;" * * *

These notices of appeal conferring jurisdiction were from only such parts of the judgment first entered as gave to the Canal Company the relief prayed for in its cross-bill. They do not confer nor purport to confer jurisdiction *of the original cause or of any part thereof*, but expressly except therefrom so much of the judgment as by any possible construction was entered or *could have been entered in the original cause*. The Wis. Rev. Stats. (2 S. & B. R. S.) relating to appeals provide, so far as pertinent hereto, as follows:

"Section 2405. *The supreme court shall have and exercise an appellate jurisdiction only*, except when otherwise specially provided, etc. * * *

"Section 3049. An appeal must be taken by serving a notice, in writing, signed by the appellant or his attorney, on the adverse party, and on the clerk of the court in which the judgment or order appealed from is entered, *stating the appeal from the same, and whether the appeal is from the whole or some part thereof; and if from a part only, specifying the part appealed from.*" * * *

"Section 3071. Upon an appeal from a judgment or order or upon a writ of error, the supreme court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may, if necessary or proper, order a new trial; *and if the appeal is from a part of a judgment or order, may reverse, affirm or modify as to the part appealed from.*"

That the jurisdiction of the court is limited by the appeals, cannot be questioned (Spaulding v. Railroad Co., 57 Wis. 304–310); nor that the appeals limit the power to direct entry of judgment below (Morse v. Stockman, 69 Wis. 272).

Says Newman, J. (after declaring the effect, as he construed it, of the judgment of April 19, 1894, upon the apportionment between the several channels) (Pr. Rec., p. 549, line 20): "There is no appeal from this part of the judg-

ment, so no consideration of it by this court is due or proper." * * * "The right of this contention of the Green Bay & Mississippi Canal Company was the only question presented by these appeals."

And again says Cassoday, C. J. (after referring to the effect of the judgment of April 19, 1894) (Pr. Rec., p. 578, lines 21 to 35): "From those portions of the judgment there had been no appeal, and hence the same were never before this court for consideration."

And to the same effect (Pr. Rec., pp. 554–568) is the recital made by the superior court in its judgment entered pursuant to mandate on the hearing of such appeals, namely, that they were appeals from the judgment entered on the "*issues joined on the said cross-bill of the Canal Company.*"

As to the affect of an attempted entry or direction of judgment without the jurisdictional limits of the court, say this court:

"Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. The limitation was well expressed by Mr. Justice Swayne, in Cornett v. Williams, 20 Wall. 226, when he said: 'The jurisdiction having attached in this case, everything done, within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.'" * * * "In Ex parte Lange, 18 Wall. 163, Mr. Justice Miller delivering the opinion of the court, after stating that the circuit court had exceeded its authority in pronouncing sentence upon Lange, and that its judgment was therefore void, said: 'It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case.'" (United States v. Walker, 109 U. S. 266–7.) "So a departure from established modes of procedure will often render the judgment void." * * * "The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way." * * * "Though the court may possess jurisdiction of the cause, of the subject-matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then

transcend the power conferred by the law." (Windsor v. McVeigh, 93 U. S. 274, 282-3; and see Mordecai v. Lindsey, 19 How. 199.)

Thus, without jurisdiction of all or any of the issues in the original cause, all possible purview thereof being excluded *ex industria* by the notices of appeal (and this, even though the lower court had in any part or measure passed upon such issues, a proposition controverted on our part), and with jurisdiction limited to the issues made on the cross-bill, and hence to the granting or denying of affirmative relief to the Canal Company, the supreme court issued its mandate directing entry in the court below of judgment pursuant to its opinion, and subsequently approved the judgment so entered as having been made in full compliance therewith. The judgment so entered not merely fails to give to the Canal Company greater, or even the same, relief prayed for, or merely denies to the Canal Company the relief prayed for, but, on the contrary, gives to the plaintiffs, etc., in the original cause *affirmative relief against the Canal Company* by entirely prohibiting all use for power of the waters pertaining to the north bank as it had been wont to use them, and gives this relief without prayer therefor by the plaintiffs, or by any party; relief not only not asked for, but when given of no advantage to the plaintiffs, for if the flow pertaining to the Middle channel be secured to the plaintiffs, it is to them a matter of indifference in what way the waters of the North channel be used. This judgment so entered was, by the judge of the superior court entering the same (Pr. Rec., p. 568, line 50), held to be one "covering all the issues in the case," alike those in the original cause and the cross-cause; and say the supreme court, by Cassoday, C. J. (Pr. Rec., p. 580, line 10): "The mandate was not for a new trial, nor for further proceedings according to law, but 'with direction to enter judgment in accordance with the opinion,' and the opinion left nothing undetermined. This left nothing for the trial court to do in the case except to enter judgment therein as directed."

It is submitted that the judgment under review was entered coram non judice.

The judgment first entered by the trial court of January

19, 1894 (Pr. Rec., p. 195), fully grants the prayer of the Canal Company's cross-bill, adjudges that the Canal Company has ownership and first right of use of all the waters of the river, and confines the apportionment to the waters *permitted by the Canal Company* to flow over the dam, and enjoins all defendants, other than the Canal Company, from interfering with the waters of the river so permitted to flow over the dam above Island No. 4, as to prevent their flowing into said channels in the proportions stated; an injunction which, under the conditions and facts of the case, operates only on the defendant Water Power Company, inasmuch as no other defendant was diverting the water "so as to prevent its flowing into said channels in the proportions" stated; and coming over the dam unless diverted, the waters naturally would flow into said channels in the proportions stated. Reviewing this judgment on appeal from parts thereof, as stated, the supreme court evidently misapprehended its purport. Say the court (Pr. Rec., p. 549, line 10, etc.): Newman, J. "This action was originally commenced" * * * "to obtain an adjudication of the relative proportions of the flow of the river below the dam in the several channels and to enjoin the Kaukauna Water Power Company from diverting any water to the South channel which of right should flow in the middle channel. *An adjudication of these relative rights is included in the judgment of the trial court, and all parties are by it enjoined from interfering with the flow of the water in the several channels in the proportions adjudged to be the due of each channel. There is no appeal from this part of the judgment, so no consideration of it by this court is due or proper.*"

And (Pr. Rec., p. 578, line 29) Cassoday, C. J.: * * * "*but the balance of that judgment, relating as it did to the partition of the water-power between the several riparian owners below the dam, had been entered by agreement and stipulation between such riparian owners, including the Canal Company, and from those portions of the judgment there had been no appeal, and hence the same were never before this court for consideration.*"

And still later, on motion to reinstate appeal, the court say (Pr. Rec., p. 593, line 42), Cassoday, C. J.: * * * "Counsel for the appellant *seems to be correct in claiming that in deciding the motion to dismiss the appeal we overlooked the fact that the complaint for the partition of the water in the river below the dam and above the head of the*

islands mentioned admitted that the Canal Company was then drawing one-half the flow of the river from the dam in and through its canal to a point below the head of Island No. 3, and there used or leased to others to be used as water-power, while passing from the canal down into one or more of the channels below the dam, and that the prayer of the complaint asked no restraint of such drawing and use by the Canal Company, but simply asked an injunction against the Kaukauna Water Power Company, and that the court should determine and adjudge what share or proportion of the entire natural flow of the river was appurtenant to and of right should be permitted to flow in the South, Middle and North channels of the river, respectively. *The purpose of the action was not to contest conflicting claims to water above the dam nor such as flowed in the canal*, but to partition the water which might flow in the river below the dam *between the several owners thereof.*"

An inspection of this judgment first entered (of January 19, 1894) shows "that it was not the waters of the river, but those only by the Canal Company *permitted* to flow over the dam, which were for apportionment. And further than so limited, there was no adjudication of apportionment whatever. The statement by Newman, J., that an adjudication of these relative rights (referring to an alleged apportionment of the flow of the river between the *several owners*) is included in the judgment of the trial court, and all parties are by it enjoined from interfering with the flow of the water in the several channels in the proportion adjudged to be the due of each channel, is clearly erroneous. The judgment did not go to such extent, and there was no injunction whatsoever against the Canal Company, either in fact or in form. The language is, "against all the other defendants" (other than the Canal Company). And so is the like statement of Cassoday, C. J., to the effect that the judgment related to the partition of the water-power between the several riparian owners below the dam, and that it had been entered by agreement and stipulation between such riparian owners, including the Canal Company, etc., also clearly erroneous. The judgment in question was not entered by agreement and stipulation between such riparian owners. The only stipulation to which this statement can relate

is given at page 492 of the Printed Record, and is as follows:

"The parties agree that by the fair result of the testimony in the case the natural flow of the river in the different channels was as follows: 43-200 in the South channel, 62-200 in the Middle channel, and 95-200 in the North channel, provided that this agreement shall be subject to whatever decision the court may make upon the issues raised by the answer and cross-complaint of the Green Bay & Mississippi Canal Co. and the several answers thereto."

And clearly the effect of this stipulation was misconceived. Nor, as we have heretofore shown, is it true as stated by Cassoday, C. J., that "the purpose of the action was" * * * "to partition the water which might flow in the river below the dam (meaning all water of the river not *actually used* in the lockage of boats in the course of navigation) between the several owners thereof." The "purpose of the action" was not to partition the water, etc., "between the several owners thereof," but only to so far apportion the same between the three channels as to ascertain the share or proportion of waters pertaining to the Middle channel, and to enjoin the Water Power Company from diverting the same, but not to interfere with the waters pertaining to the South channel. The ascertainment "of the rights of the several owners" was not within "the case made by the plaintiffs and embraced within the issue" as required by statute, and hence could not have been embraced within the judgment of even the lower or superior court. And this, as hereinbefore shown, was so held by the court on demurrer, and should be *res adjudicata* (Pr. Rec., p. 49, line 34), being so held, contrary to the Calhoun Jackknife theory *by the same court*, although since then all five of its members, save one, have been changed. Cassoday, C. J., frankly admits that, in deciding the motion to dismiss the appeal, the court "overlooked the fact that the complaint for the partition of the water in the river below the dam and above the head of the islands mentioned admitted that the Canal Company was then drawing one-half the flow of the river from the dam in and through its canal to a point below the head of Island No. 3, and there used or

leased to others to be used as water-power, while passing from the canal down into one or more of the channels below the dam, and that the prayer of the complaint asked no restraint of such drawing and use by the Canal Company, but simply asked an injunction against the Kaukauna Water Power Company," etc. And this oversight on the part of the court explains, as we think, the misconception which has betrayed the court into the error of which we now complain. It is clear that the superior court did not in its first judgment of January 19, 1894, adjudicate respecting apportionment to the extent stated in the excerpts made from the opinions of the court. And equally clear, we think, did not pass or act at all upon *any* of the issues in the original cause. As it will be conceded that such issues were not taken to the supreme court by appeal, and that it was without jurisdiction to direct entry of judgment thereon.

The effect of the judgment entered on the mandate is to require the Canal Company to return the whole water of the river other than the water actually wasted in locking boats in the course of navigation,—one per cent. of the water, according to Newman, J.,—back to the stream far enough above the head of Island No. 4 to enable the water to pass into the several channels in the proportions stated, thereby preventing the Canal Company from using the half of the water pertaining to the North bank and North channel, where it was using the same when the suit was commenced, and while its right to there use the same was admitted by the plaintiffs and adjudged by the trial court. And that in the opinion of the supreme court it so operated, clearly appears from the excerpt from its opinion last above given, so that the judgment in question, rendered *coram non judice*, deprives the Canal Company of its property of great value, being the right of use for power as it has been wont to use the same of the half flow of the river pertaining to the North bank and North channel, and hence renders null and void each of its several claims of ownership, namely: The claim based upon the appropriation of all the waters of the river made by the state vicariously for the United States; the claim based upon the contention that the government

canal, so-called, is an extension of the dam, and hence falls within the Kaukauna case; the claim based upon the contention that the canal itself is one of the works of improvement, and finally, *not least of all, the claim based upon riparian ownership*, not at all involved in the litigation. (Says Cassoday, C. J. (Pr. Rec., p. 579, line 44): "Certainly we did something more than determine that the Canal Company was not entitled to the whole water of the river as contended by counsel; so it is *very obvious that counsel is in error in claiming that the right of the 'Canal Company to draw water through the canal as riparian proprietor' had not been considered by this court.*") Thus, the Canal Company is deprived of its property without, as we contend, due process of law, in violation of the fourteenth amendment to the constitution of the United States. Say this court:

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance. Pennoyer v. Neff, 95 U. S. 714, 733." (Scott v. McNeal, 154 U. S. 34–45; and Hamilton v. Brown, 161 U. S. 256–267.)

"Although a court may have jurisdiction over the parties and subject-matter, yet, if it makes a decree which is not within the powers granted to it by the laws of its organization, its decree is void." (United States v. Walker, 109 U. S. 258–266. "So a departure from established modes of procedure will often render the judgment void." * * * "The decree of a court of equity upon oral allegations without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts *are not* authorized to exert their power in that way." * * * "Though the court may possess jurisdiction of a cause, of the subject-matter

and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law." (Windsor v. McVeigh, 93 U. S. 274–282, 283. And see Mordecai v. Lindsey, 19 How. 199, and cases *supra*.)

And thus, also, from the record it appears, as we contend, that the Canal Company has been deprived of its property by the judgment of the superior court of Milwaukee county, entered pursuant to the mandate of the supreme court of Wisconsin, and subsequently approved therein, which supreme court, in so directing and approving said judgment, was acting as the agent and in behalf of said state in a cause to which the Canal Company was a party, without having acquired jurisdiction of the subject-matter thereof, as affecting the property taken, and in a cause over which, as affecting such property, the said superior court would not have had jurisdiction had the court in the entry of such judgment been acting independently of such mandate, and in which cause was drawn in question the validity of an authority exercised under said state on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its validity; and whereby the said Canal Company was so deprived of its property without due process of law, in repugnancy to the constitution of the United States, the same being in violation of the fourteenth amendment thereof. And this deduction brings the case within the second paragraph of the Revised Statutes of the United States, section 709, which provides as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, * * * *where is* drawn in question the validity of" * * * "an authority *exercised under any state*, on the ground of their (its) *being repugnant to the constitution* * * * *of the United States, and the decision is in favor of their (its) validity;* * * * may be re-examined and reversed or affirmed in the supreme court upon a writ of error."

The question of its jurisdiction and of that of the superior court to enter the judgment under review came up for consideration before the supreme court on the Canal Company's

appeal from the judgment, and the motions to dismiss and to reinstate such appeal, and the court sustained the validity of the authority so exercised, and held (Pr. Rec., pp. 578, 579 and 593, 594) that it was competent for the court to enter such judgment, whereby and because of such adjudication the Canal Company was deprived of its property without due process of law, in violation of the constitution of the United States. Say this court (Furman v. Nichol, 8 Wall. 44–57), Davis, J.: "All courts take notice without pleading of the constitution of the United States," etc.

But whether the fact that the question of the validity of the authority so exercised on the ground of its repugnancy to the constitution was raised and was decided in favor of its validity appears affirmatively stated in the opinion of the court, or even in the record or not, is unimportant, inasmuch as the record clearly shows that of necessity the question must have arisen and have been decided in favor of its validity, and that such decision was essential to the judgment rendered. The error complained of in this case *originated* in the entry of the judgment under review, and was the act of the supreme court. Until the error had originated, the fact that it would arise could not have been anticipated. It was not to be presumed that the court would assume to act without jurisdiction in the case. Say this court, speaking to a somewhat analogous case:

"The provisions of the fourteenth amendment" * * * "all have reference to state action exclusively." * * * "It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another." * * * "But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced." (Here in the entry of judgment.) "It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce

it, in the judicial tribunal." (Virginia v. Rives, 100 U. S. 213, op. 318.) And again in the case of Murray v. Charleston, say the court: "In the present case, it (repugnancy to the constitution) was necessarily involved without any formal reference to any clause in the constitution, and it is difficult to see how any such reference could have been made to appear expressly." (96 U. S. 432–441.)

To the proposition that the raising decision and pertinency of the federal question need not be affirmatively stated in the opinion of the court, nor for that matter in the record, the Kaukauna case referred to is authority (142 U. S. 254–269), and authority for the entire contention on this branch of the argument. The complaint in that case will, on examination, be found to be almost identical with the cross-bill in the case at bar. Neither in the answer nor in the record was there any reference to the federal constitution. Say this court:

"Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings "(in that case it was competent for the plaintiff in error to have put the same in issue in the pleadings, but not so here), "nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court." (Citing authorities.)

True, in that case the court held that the state court could not have reached a conclusion adverse to the defendant company "without holding either that none of its property had been taken or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law;" while, in the case at bar, the claim is that the defendant company was deprived of its property by the judgment of the court acting *coram non judice*, and hence, under the authorities cited, equally without due process of law. The cases appear

to be on all-fours. And in Murray v. Charleston, the court say: "The true test is not whether the record exhibits an expressed statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right." And equally in point is the later case of Scott v. McNeal, *supra* (154 U. S. 34–45). Speaking of the jurisdiction of the question the court say: "The fourteenth article of amendment" * * * "ordains," etc., * * * (citing the second paragraph of R. S., sec. 709). "These prohibitions extend to all acts of the state whether through its legislative, its executive, or its judicial authorities. (Citing cases.) * * * No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party," etc. And respecting the federal question, it appears that the record was silent, containing no express reference thereto of any kind. True, in the statement of the case, it is said (page 37): "In that (the state) court, *it was argued in his behalf* 'that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law.'" But this statement is unavailing, for in the case of Sayward v. Denny the court say (citing earlier authorities thereto), Fuller, C. J.: "*Nor do the arguments of counsel* *form any* part of the record upon which action is taken here. (158 U. S., pp. 180, 183.)

That it is sufficient when it appears by "necessary intendment" from the record that the federal question must have been raised and decided, has been the ruling of the court from the earliest day. To a few of the cases additional to those cited *supra*, reference is made. (*Marshall, C. J.*, Wilson v. Black Bird Creek Marsh Co., 2 Peters, 245, 249; Miller v. Nicholls, 4 Wheaton, 311–315; Armstrong v. Athens Co., 16 Peters, 281, op. 285; *Miller, J.*, Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 142; *Davis, J.*, 8 Wall. 56–57; *Harlan, J.*, Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 579; *Waite, C. J.*, Eureka Lake Co. v. Yuba Co., 116 U. S. 410, 415; *Field, J.*, O'Neil v. Vermont, 144 U. S. 323–347; Eustis v. Bolles, 150 U. S. 361.)

Respecting the form of assignments of error to be made on writ of error from this court, there is no special requirement. That they shall be sufficiently clear, specific and definite is presumably required, and while they may be filed

in the state court (R. S. U. S., sec. 997) they are not required to be so filed. Say the court, *Waite, C. J.:*

"A failure to annex to or return with a writ of error an assignment of errors, as required by sec. 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, rule 21, *it will ordinarily be enough.*" (School District of Ackley v. Hall, 106 U. S. 428; Gumbel v. Pitkin, 113 U. S. 547.)

And that filing in this court is the older and better practice, see Conklin's Treatise on Federal Practice, 3d ed., p. 693. Deficiencies in existing assignments of error, if any, can be supplied under Rule 21. The case does not fall within Rule 35.

Counsel for the Kaukauna Water Power Company and the Hewitts suggest that the judgment of the court under review, even if erroneous, on the federal question rests "as well upon common-law doctrine," and consequently is not for review here, and cite to the court cases to the extraordinary proposition that, "whenever a water-course divides two estates, the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite," etc. Unfortunately for this suggestion, it does not appear to have been acted upon by the court, for there is no reference to the question in the opinions filed. But a better answer is, that the question was not before the court, as it could not arise in a case in which the owners of the shores of the Middle channel as a body were suing the owners of the shores of the other, the South and North channels, for an apportionment between the channels of the flow of the river incidentally and only so far as necessary to secure to the Middle channel its proportionate share of the flow. And especially could not arise in a case wherein the chief parties litigating, the Patten Paper Company (Limited), Green Bay & Mississippi Canal Company and Kaukauna Water Power Company, were each and all interested as riparian owners in all three of the channels, and the Hewitts in two of them, the Middle and North channels, while the other parties, for the most part, were interested as

tenants or otherwise under the parties last named. There is no *owner* of the "opposite shore" who has filed in this case complaint or cross-bill, or even by answer made prayer for any relief of the kind in question. And the Kaukauna Water Power Company, owning the south bank of the river, was not in position to make such contention side by side with the claim that it had the right to divert from the Middle channel sufficient water to enable it to use in its canal one-half of the flow of the river, a claim relying upon which it incurred the great expense of constructing the canal on the south side. And the Hewitts are in no better position. They are not the owners of the south bank of the river, and, though interested in the Middle and North channels, have not filed complaint, or cross-bill, or made prayer for such relief, or made allegations upon which such relief could be given. It will be time enough to consider this matter when it arises. "Sufficient unto the day," etc.

It is submitted that this court has jurisdiction under the eleventh assignment of error.

Assignments of Error Numbers 6 and 7.

The sixth assignment (Pr. Rec., p. 10) in effect charges error in that by its judgment under review adjudging that the dam at Kaukauna consisted only of the cross stream section part thereof, and did not embrace the entire structure from lot five on the south side to the upper lock on the north side, by means of which structure the force of the river was resisted and the level of the water in the pond maintained, and that the Canal Company was not the owner of and be enjoined from using the waters of the pond by drawing the same through the structure in question near to, above and below the head of Island No. 3, and there discharging the same into the North channel at the places and only places where theretofore it had used the same, the state court failed to give effect to the judgment of this court (142 U. S. 254), wherein it was in effect adjudged that the Canal Company was the absolute owner of all the water-power

created by the dam, exclusive of the use of waters for lockages made in the activities of navigation, and thus deprived the Canal Company of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States.

Assuming that the cross-stream section constitutes the dam, and that the extension down stream known as the government canal was not a part thereof, *the seventh assignment* (Pr. Rec., p. 11) in effect charges error in this: That such canal and the said dam were each integral parts of the work of improvement, and that the water-power created by the construction of the canal was appropriated, created, transferred to and vested in the Canal Company, at the same time, by the same proceedings and in the same manner and ways with the power created by the said dam. And that in depriving the Canal Company of such water-power as aforesaid, the judgment of the state court failed to give effect to the judgment of this court, and which, on the assumption aforesaid, logically and in effect adjudged the ownership of such water-power to be in the company, and thereby deprived it of its property without due process of law, in violation of the fourteenth amendment aforesaid.

The judgment in the case of Kaukauna Water Power Company against Green Bay & Mississippi Canal Company, reported 142 U. S., p. 254, hereinafter referred to as the Kaukauna case, which was brought here on writ of error to the Wisconsin state court, and affirmed by this court, had relation to the Kaukauna dam hereinbefore mentioned and the water-power thereby created, and determined the ownership of such water-power and of the whole thereof to be in the Canal Company. The question arises as to the scope of these decisions in their reference to the power created by the dam, and whether thereunder the dam consists only of the cross-stream section part thereof, or, as we contend, the whole structure which upholds the level of the pond. The cross-stream section does not extend to the north bank, but goes near to it and then turns down stream a distance of about eleven hundred feet, and then neces-

sarily following the high bluff goes inland a further distance of about one thousand feet to the first lock. This entire structure from the south bank to the first lock is a strong embankment, so constructed as to resist the power of the river. It is through this embankment below the cross-stream section that the Canal Company has long been using and is still using through the mills of its tenants water for power, and the fact that it was so using the same was before the court in the Kaukauna case, as appears from the statement of facts given more fully in the report of the case in the state court. (70 Wis., p. 636.) And the right so to use the same or ownership of such power was, as we contend, included in the ownership or right of use of water-power which by both courts it was adjudged was vested in the Canal Company, as it is only through this embankment or structure at the places mentioned that the Canal Company has ever used for power the waters of said pond.

The state court, speaking of a *down-stream structure or embankment similar to all intents and purposes* with the one under consideration, on the same river and part of the same work of improvement, and connected with the cross-section of a dam next higher on the river than the dam in question, held that such portion of dam or embankment extending down stream below the cross-section was a *wing of the dam.* In Lawson v. Mowry (52 Wis. 219, op. 237), say the court:

"The water-power thus created by the dam was not necessarily confined to the *use of it at the dam.* It is common to conduct water from a pond created by a dam by means of artificial channels, in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. The embankment or land between such artificial channel and the bed of the stream is, nevertheless, as necessary to preserve the water-power as the dam itself. *It is, in effect, nothing less than a wing of the dam. The canal down as far as the lock is in effect nothing less than an enlargement or arm of the pond created by the dam.* It is the fall of the water which gives the power, and the power which gives the value for hydraulic purposes."

See Century Dictionary — *Dam,* noun, "A dam, a body of water hemmed in — I. A mole, bank or mound of earth,

or a wall, or a frame of wood, constructed across a stream of water to obstruct its flow and thus raise its level, in order to make it available as a motive power, as for driving a mill wheel. Such an obstruction built for any purpose, as to form a reservoir, to protect a tract of land from overflow, etc.; *in law*, an artificial boundary or means of confinement of running water or of water which would otherwise flow away. II and III not applicable. IV. The body of water confined by a dam."

Assuming for the purposes of the statement that the structure below the cross-section of the dam extending down stream be not an extension of the dam, but a canal proper, nevertheless it is quite as much as the cross-section of the dam a part of and one of the works of improvement, and the water-power thereby created, there being a fall in the bed of the river of over eleven and nearly twelve feet from the foot of the dam to the first lock, is now, as we contend, vested in the Canal Company. The appropriation made by the state vicariously for the United States by the act of 1848 was of all powers created by "*any dam or other work of improvement*," — a provision of law which this court construed in the Kaukauna case. All grants, transfers and transactions affecting the dam, and under which the Canal Company acquired its title to the water-powers created thereby, embrace and cover in, almost in the language of the act of appropriation, other works of improvement as well as the dam, so that necessarily the same title was acquired to water-powers created by "other works of improvement" as was acquired by the words "any dam." And no reason can be assigned why it was not as necessary to the public weal that the waters of the river be appropriated for the canal and there controlled by the government, as that they be appropriated for the dam and there so controlled. So that, whether the water-power rights in question are created by the dam or by a work of improvement connected therewith, is unimportant, as in either case clearly they are the property of the Canal Company. But as we contend, the down-stream structure is a part of the dam.

This court, in its opinion, after upholding the Canal Company's title to the water-power created by the dam exclusive of the waters needed for navigation, thereby affirming the previous judgment made in the case by the state court, at the foot thereof say (142 U. S. 282):

"We do not undertake to say whether a bill in equity framed upon the basis of a large amount of surface water not used, might not lie to compel an equitable division of the same upon the ground that it would *otherwise run to waste,*"

and thereby, as we understand it, interpreted, and affirmed as interpreted, what this court understood to be the limitation made in its judgment by the state court, namely (70 Wis. 657):

"We do not here determine the relative rights of the plaintiff and other riparian owners below the dam, in respect to the use of the water *which would run over the dam if not taken from the pond into the canal;* nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam."

That this was the interpretation given by this court clearly follows from the following paragraph in its opinion (p. 276, stating facts wholly true as applied either to the Kaukauna case or to the case at bar, there being neither allegation nor proof to the contrary in either case), namely:

"No claim is made in this case that the water-power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water-power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circum-

stances of this case, we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam."

So interpreted, the judgments in the Kaukauna case, of both the state court and this court, are to the effect, as stated in the opinion of the state court, viz. (p. 651): "*We conclude, therefore, that whatever rights the state took to the Kaukauna water-power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act) is vested in the plaintiff.*"

And because impelled thereto by these decisions, acting directly upon the facts of the case at bar, the superior court entered its first judgment, January 19, 1894, *whereby it adjudged to the Canal Company ownership and prior right of use for power of all of the surplus waters of the river, whether at the dam or below the dam, or below the lock or elsewhere, wheresoever the Canal Company should elect to use the same.*

But the judgment under review, entered pursuant to mandate in place of the judgment first entered, failing to give effect to the judgment of this court, and in disregard of its provisions, enjoins the company from using the waters of the pond through the down-stream extension of the dam, and holds that the same, *if used for power, must be used at the cross-section of the dam*, so near thereto that it shall not impinge upon the rights of other riparian owners. The state courts, both supreme and superior, although urged thereto, omitted and refused to give more definite directions with respect to the place of use. Inasmuch as the south bank of the river below and running up to the dam is owned by the Water Power Company, one of such riparian owners, and the judgment adjudges to the riparian owners below the dam the right to have the waters flow by their respective banks as they were wont to run in a state of nature, it becomes practically impossible to use for power the waters of the pond, *even at the cross-section of the dam*, for they cannot be so used and yet flow by the bank of the Water Power Company close to the dam; and thus not only limits the effect of this court's decision, but renders the decision

nugatory, and at best declaratory of a barren right by *making practical use of the power impossible.* Irrespective of such limitation, practical use for power of the waters of the pond above the places where the same have heretofore been used by the Canal Company as aforesaid, is difficult and embarrassing, if it be not impossible.

The only points of distinction made in the opinion of the court directing the judgment under review whereby the canal structure is considered to differ from an extension of the dam are (Pr. Rec., p. 545), Newman, J.: That the canal bank was cut "in order to make water-power;" "the first reach of the canal to the first lock did not create a water-power. No power existed there until the bank of the canal was cut for the very purpose of creating it;" and further, "it was created for its own sake and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream. * * * It is merely color to cover the substraction of the riparian right to this private use of the water of the stream."

The two propositions that cutting the bank created power, and that the power howsoever created is not incidental to the improvement, we conceive to be erroneous. That the proposition that cutting the bank is erroneous seems to be clear. The bank is cut not to create power, but to utilize power already created, *otherwise every flume creates power.* Whereas, it is understood to be a mere means for using power. Chief Justice Gibson defines water-power (McCalmont v. Whitaker, 3 Rawle, 90) as follows:

"The water-power to which a riparian owner is entitled *consists of the fall in the stream* when in its natural state, as it passes through his land or along the boundary of it; or, *in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it.* This natural power is as much the subject of property as is the land itself."

And this definition is followed in Borard v. Christy, 14 Pa. St. 267; and by Woodward, J., in Brown v. Bush, 45 Pa. St. 61; and in Angell on Water Courses (6 Perkins' ed.), sec. 95 and note, and secs. 144–5 and (7th ed.) secs. 95–95*a*, 144–5, citing many cases, and in other works on waters. And see the Century Dictionary, title "Water Power."

It is the act of bringing a body of water to a place where it can be discharged to a lower level than its own that creates water-power. All this was accomplished by the fall in the stream and the construction of the dam, canal and embankments. It is the dam and canal or dam extension structure together with the fall in the stream which creates water-power. The openings in the canal bank are the means by which the power is utilized, and are not the means by which it is created. If there had been no fall in the stream, and no difference in level between the water in the canal and the water in the stream below, cutting the bank would not have created the water-power. Something more than this was required.

That the proposition that the power, howsoever created, is not incidental to the work of improvement is erroneous, is, we think, equally clear. The dam and entire canal structure were part of one plan or system of works *designed and adopted by the state through its board of public works;* were builded together one with the *other by the state* (*and its successors*) for the purpose of making a single work of improvement, the object of which was primarily an improved channel for navigation, and secondarily, or incidentally, the creation of water-power, both of which, the channel and water-power, should belong to the state (and its successors), and from each of which it should derive a revenue — tolls from the channel for navigation and water rent from water-power. The fact seems to be overlooked that although the water channel came immediately into use for navigation, it was years before any part of the water-power created by the dam and other work of improvement came into use, and that as yet a large portion of it is unused. The fact, foreseen from the beginning, that the water-power would long remain unused (as the early engineer, Westbrook, said, "Any estimate of the water-powers would be more curious than useful"), itself would indicate that water-power was the secondary or incidental object, and navigation the primary object. The fall of the river was such that, without a waste of trust funds, the canal could not have been built

in any way other than that in which it was builded. Locks of less than ten feet lift would have made needless obstacles to navigation. Both dam and canal as constructed were constructed together, according to the plans adopted, to aid navigation and were necessary for navigation, and when completed went into immediate use therefor and have so remained in use ever since; while for water-power purposes they did not go into use for years, and as yet are not in full use. Both objects are secured by the work of improvement, and both were contemplated in the legislation authorizing it.

The fact that all the waters of the river have not been used by the company does not affect its right of use. For says Chief Justice Gibson in the case of McCalmont v. Whitaker, *supra:* "The water-power" * * "*consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it.* This natural power is as much the subject of property as is the land itself." * * "*It may be occupied in whole, in part, or not at all, without endangering the right or restricting the mode of its enjoyment*, unless where there has been an actual adverse occupancy for a period commensurate with the statute of limitations."

And the New York Court of Appeals, Denio J.: "The omission by the owner during twenty years to make use of water-rights does not impair his title or confer any right thereto upon another. It is not the non user by the owner, but the adverse enjoyment by another during the twenty years, which destroys his right."

Townsend v. McDonald, 12 N. Y. 381.
Pillsbury v. Morse, 44 Me. 154.

The pivotal question appears to be simply this: Is the improvement structure, consisting of dam, extension of dam, or canal with embankments, of such nature and form that it will admit, or consistently with the plans can be made to admit, of the practical and efficient use at the lock of the whole flow of the river and hence of the half flow pertaining to the south bank? To the extent of flow that can be so used, certainly to the extent that is used, the entire structure must stand on the same footing with the cross-dam itself. The declaration of intent to take, made by the act of appropriation, the plans, the structure and the public

need, was followed by the overt act of taking, excepting only that part of the flow was not put to use. Had the spill of the dam been located opposite the lock, and not as it was at the natural bed of the stream, then the water would have been physically taken from the riparian owner. But will it be claimed that rights such as are in contention here, can be determined by the accidental location of the spill of the dam? The words of appropriation were, of every water-power created by the "dam *or other work of improvement.*" And the structure made pursuant to that declaration was ample for the diversion of the water of the river, while such diversion, unless put to water-power uses, would serve no useful purpose, but yet could at the option of the government be discharged down the canal through the locks and waste-weirs around the locks, and at the same time would needlessly deprive the riparian owner of the use of the flow of water now permitted to waste over the dam. The suggestion that this structure was made not for navigation, but to create a water-power, that is, was made solely for water-power uses, has no foundation in the proofs nor in the statement of counsel, so far as we are advised. If such were the fact, it would bar the state quite as much as any grantee of the state from taking the water either without making or upon making compensation. The state cannot take private property for private use even upon making compensation. If the state may do what it has done, it is because it has so done in the exercise of the public right of improving navigation, and there is nothing in the pleadings or record questioning the right of the state to do as it has done. And especially to do as it has done in its application to the half flow pertaining to the north bank, for that question, as we have shown already herein, was one not before the court and hence not *properly covered* by the judgment under review.

The court has wholly failed, we think, to justify its limitation of the decision made by this court, and has failed to give effect to its directions, and as well has failed to give effect to the directions made by its own previous judgment,

which, bearing upon the same facts involved in the case at bar, should be *res adjudicata*, and quite as much so even though since then the *personnel* of the court has been largely changed.

Our contention is that by the said judgment and decision of this court, the exclusive ownership or right of use for power of the surplus waters of the pond not needed for navigation, or, in other words, all surplus water-power created by the dam, including the extensions thereof, or if such extensions be in fact a canal or a separate work of improvement independent of the dam, all surplus water thereby created, including the power in use by the Canal Company at the time of such decision, was awarded and adjudged to the Canal Company, and that in so awarding and adjudging such ownership and right to the Canal Company, this court was acting as agent and in behalf of and under an authority exercised under the United States; and that by the judgment under review, the supreme court of the state has failed to give effect to such judgment and decision, and in disregard thereof has thereby adjudged that the Canal Company does not have such ownership and right, and has enjoined the Canal Company from using the said waters for power as it had been theretofore using the same, and from using for power any of such waters from said extension of dam or canal, and has thereby deprived the Canal Company of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States, and that this fact presents a federal question arising under the third paragraph of section 709, Revised Statutes of the United States.

The effect due to the decision of this court is denied and is not given to it by the state court. Say this court (Crescent City Live Stock Co. v. Slaughter House Co., 120 U. S. 141, head note):

"And whether such due effect has been given by a state court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this court, on a writ of error to the supreme court of the state."

And in Dupasseur v. Rochereau, 21 Wall. 130–134, Bradley, J.:

"Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the court (circuit) and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts."

And the following among many other cases: Sharpe v. Doyle, 102 U. S. 686; Railway Co. v. Plainview, 143 U. S. 371–390; Earnshaw v. United States, 146 U. S. 60–66; Phœnix Ins. Co. v. Tennessee, 161 U. S. 185.

The title or right by the judgment under review denied to the Canal Company, and conferred upon it, as we contend, by the state supreme court in the Kaukauna case, was specially set up in the Canal Company's answer and counter-claim herein. (Pr. Rec., p. 56.) And in the same as amended. (Pr. Rec., p. 99.)

This amended answer with counter-claim was served on and prior to August 21, 1890, and subsequently thereto, on the 21st day of December, 1891, the state judgment in the Kaukauna case so set up was affirmed in this court as stated, thereby affirming, interpreting and operating upon the judgment so set up in the answer. On the trial of the issues raised in the original and cross-suits in the case at bar, the said judgment of this court (142 U. S. 254) was by stipulation of all parties admitted in evidence and presented to the court (Pr. Rec., p. 336, fol. 433), and was considered by the state supreme and superior courts — by the superior court in the entry of its judgment of January 19, 1894, carrying out the spirit and letter of the decision; and again in the superior court at the time of the entry of judgment pursuant to mandate, by the Canal Company's application

to amend its answer, thereby specially setting up the claim under this judgment, and raising a federal question (see brief of Mr. Ordway on this motion, p. 30); and *in the supreme court*, as appears from the opinions of the court (Newman, J., Pr. Rec., pp. 543–545, and Cassoday, C. J., Pr. Rec., p. 594), although failing to give effect to this court's judgment.

The fact that special reference in terms to the constitution of the United States does not appear from the record to have been made, arises from the fact that it could not be made, inasmuch as the failure of the supreme court to give effect to the judgment of this court could not have been anticipated. "But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be and generally will be after the trial has commenced" * * * (in this case on directing the entry of final judgment). "Nor can the defendant know until then that the equal protection of the laws will not be extended to him." (100 U. S. 315–319.) The judgment of this court was controlling in the case, and *should have been regarded by the* supreme court, and the Canal Company could not anticipate that it would not be regarded. The error occasioned by such failure to give effect to the judgment of this court is the error of the state supreme court, and, excepting by argument to the court, which is not a part of the record (158 U. S. 180–183), there has been no opportunity for setting up the title or right denied to the company. See authorities cited *supra*. It appears from the record, however, that the question was before the court, was specially set up and claimed to the utmost extent possible, and was decided adversely to the title and right adjudged to the Canal Company by the decision of this court, and such decision was essential to the judgment rendered by the state court. And it follows, we contend, that the question is one for review by this court.

ASSIGNMENTS OF ERROR NUMBERS 3, 4, 5, 8, 9 AND 10.

These assignments of error all relate to the Canal Company's ownership or title to the water-powers in question; which title, while in terms relating to all of the surplus

water-powers of the river, has application in this litigation, only to those relating to the half flow of the river pertaining to the south bank, covering the Middle and South channels, and does not have application, as we contend, to the water-powers of the river relating to the half flow of the river pertaining to the north bank; and also, as we contend, is confined in its application to rights other than riparian, acquired directly and indirectly from the United States.

The company's ownership or title in question comes from the United States and from the state acting vicariously for the United States, and has three sources, namely: (1) legislative grant, (2), the reservation of an easement, and (3), rights acquired by arbitration.

The following statement of facts, much the same as presented to the state court, gives the facts from which the Canal Company's title arises. We regret the necessary length of this statement, but respectfully suggest to the court that on this motion it is yet spared the even more extended and tedious argument.

Reference is also made to a volume called Canal Company Documents, a copy of which for convenience was filed with the clerk of this court in the Kaukauna case, and this by stipulation as affecting the judgments, report of Secretary of War, etc., is made a part of the record (Pr. Rec., pp. 335–336).

STATEMENT.

The Fox and Wisconsin rivers are public navigable waters of the United States of the class covered by the ordinance of 1787,[1] section 13 of which declares as follows:

> "It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as *articles of compact* between the original states and the people and states in the said territory, *and forever remain unalterable, unless by common consent*, to wit: * * * Art. IV. * * * The navigable waters leading into the Mississippi and St. Lawrence *and the carrying places between the same* shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

This dedication to public uses was re-asserted, and the provision itself re-enacted, in the act providing for the ter-

[1] Wis. R. S., 1858 ed., p. 1065, sec. 13.

ritorial government of Wisconsin, approved April 20, 1836,[1] in the enabling act providing for the admission of Wisconsin into the Union, approved August 6, 1846,[2] in the constitution of Wisconsin[3] when admitted by act approved May 29, 1848,[4] and in the acts of the legislature subsequently passed.[5]

These waters, thus unalterably dedicated as public highways, are by the federal and state courts held to be public waters of the United States over which its jurisdiction, as distinguished from the jurisdiction of the several states, extends, and to which all federal laws relating to public waters apply.[6] In recognition of the United States' ownership of these waters, congress made by act approved August 8, 1846, a grant of lands to the then territory of Wisconsin in trust to aid in improving the navigation thereof. * * *

"The said rivers when improved and the said canal" (connecting the rivers) "when finished *shall be and forever remain* a public *highway for the use of the government of the United States free*," etc. * * * Sec. 2. As soon as the territory be admitted as a state, "all the lands granted shall become the property of the state," * * * "provided that the legislature shall agree to accept such grant upon the terms specified in the act, and shall have power" (by its constitution) * * * "*to adopt such kind and plan of improvement* on such route as the said legislature *shall from time to time determine* for the best interest of said state." * * * Sec. 3. The improvement shall be commenced within three years after the admission of the state, and completed within twenty years, "or the United States shall be entitled to receive the amount for which any of said lands may have been sold by the state."[7] * * *

Upon admission into the Union, the state, June 29, 1848, accepted the grant and assumed the trust subject to the conditions imposed, but did not and could not under its constitution assume any pecuniary responsibilities with respect thereto. The first legislature, August 8, 1848, passed the Board of Public Works Act, section 1 of which describes the improvement to be a work contemplated by congress.[8] By this act a board of public works was raised, upon whom was devolved the duty of adopting a plan and kind of improvement for said rivers, and of constructing the same by applying thereto the avails of the lands granted

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[1] Id., p. 1071, sec. 12.
[2] Id., p. 1081, sec. 3.
[3] Id., p. 1084, sec. 2.
[4] Id., p. 40, art. IX, sec. 1.
[5] Wis. R. S., 1878 ed., sec. 1596.
[6] The Montello, 20 Wall. 430; The Daniel Ball, 10 Wall. 555; Ex parte Boyer, 109 U. S. 630; In re Garnett, 141 id. 15; Morse v. Insurance Co., 30 Wis. 496, op. 505, reluctantly following the Montello at Circuit, which subsequently was reversed in Supreme Court. Wis. River Imp. Co. v. Lyon, 30 Wis. 61, op. 66.
[7] Act granting lands, Canal Co. Doc., p. 9; 3 C. C. Doc., p. 12; 4 C. C. Doc., p. 11.
[8] C. C. Doc., p. 13; R. S. 1849, p. 765.

by congress.[1] For a time the sales of lands were sufficient to carry on the work, but soon thereafter altogether ceased, and. to carry out contracts already entered into, the board, under authority from the legislature, issued certificates of indebtedness, in verification of which the great seal was affixed.[2]

These certificates on their face were declared to be a charge upon the proceeds of the sale of lands granted by congress, and upon the revenues to be derived from the works of improvement by tolling the same, and upon the avails of the water-powers incidental to such works. The non-liability of the state upon these certificates was early adjudged by this court;[3] but the fact that they were issued in aid of a work in charge of the state, and over the great seal of the state,[4] caused them to be circulated in the markets of the country as state indebtedness. The fear that these certificates, already issued to a large amount, and circulated as state indebtedness in the markets of the country, in spite of the decision of the court,[5] might in time seriously affect the credit of the state, induced the legislature, July 6, 1853, to create a corporation and transfer to it the works of improvement, *incidental water-powers* and right to acquire lands, all subject to the same trusts in all respects as were imposed upon the state by congress.[6] The company agreed to pay the state indebtedness and fully to execute the trust imposed upon the state, and forthwith undertook the work. In all that the state did towards the construction of the improvement, it acted as the trustee of the United States. In all that the Fox and Wisconsin Improvement Company did, it acted as the *quasi trustee* of the United States.[7] The works of improvement were constructed and continuously belonged to the United States, subject only to the right of tolling the same granted by the state to the improvement company, and the right of the company to the use of the surplus waters incidental to the improvement. Additional lands were granted by congress to the state for the same purpose in 1854 and 1855.[8]

In 1856 the relations between state and the Improvement

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[1] C. C. Doc., p. 24, ch. 74, Laws of 1849; C. C. Doc., p. 27, ch. 283, Laws of 1850; C. C. Doc., p. 35, ch. 340, Laws of 1852, sec. 12; C. C. Doc., p. 29, ch. 179, Laws of 1851.

[2] C. C. Doc., pp. 33, 34.

[3] State ex rel. Resley and others v. Farwell, Gov., etc., 3 Pinney, 393.

[4] C. C. Doc., pp. 31–33.

[5] C. C. Doc., p. 39, ch. 73.

[6] C. C. Doc., p. 40, ch. 98, Gen. Laws 1853.

[7] C. C. Doc., p. 40, Art. Ass'n, art. VI, referred to in ch. 98, sec. 2, and Bond and Releases, C. C. Doc., pp. 95, 97.

[8] C. C. Doc., pp. 45, 46.

Company were modified.[1] The lands to which the company theretofore had only the right to acquire by retiring state indebtedness so called, as well as the new grants of 1854 and 1855, all were granted to the company, on condition that it should forthwith execute to three trustees, to be appointed by the governor, a conveyance of the works of improvement, the *incidental water-powers* and all of the lands so granted to the company in trust, to apply all revenues derived from the improvement and from the *incidental water-powers* and the proceeds of the sales of lands: first, to the payment of state indebtedness, and the completion of the construction of the improvement; and second, to the payment of an issue of one and one-half millions of bonds to be made by the company coincident therewith, and thereafter for the purposes of the company. The trustees so appointed acted for the state, and were by this court held to be state officers.[2]

At this time the company was reorganized. Eastern people were brought in as shareholders, and by an increase of capital stock a large amount of money was raised in the confident expectation that the improvement would shortly thereafter be completed.[3] But the panic of 1857 followed — the sale of lands fell off — marketing the bonds so issued at even an approximation of their face value became impossible; the war came on, and in 1864 the company failed. The deed of trust was foreclosed, and the property of the company, consisting of the works of improvement, that is, the right to toll the works of improvement, *the incidental water-powers* and the lands, all were sold about February 1, 1866, pursuant to decree of court entered February 4, 1864.[4] The parties purchasing were largely the shareholders of the old company, using as purchasing money thereat, to a considerable extent, the certificates of state indebtedness, so-called, which, as individuals, they had been obliged to buy in. The amount realized at the sale was just sufficient to pay the state indebtedness and the sum estimated, by a commission duly appointed, to be necessary to complete the improvement. Thus, in order to raise funds for completing the improvement, it was necessary to sell all of the property of the company, lands, tolls and *water-powers*, including the powers at Kaukauna in question, the same being specially mentioned in schedule (G) attached to the foreclosure judgment and schedules (10 and 13) attached to the Report of Sale.[5] By this sale of the water-powers the

[1] C. C. Doc., p. 46*a*, ch. 112, Laws of 1856.
[2] Butler et al. v. Mitchell, 15 Wis. 389.
[3] C. C. Doc., 100*a*; ch. 66, p. 47; ch. 180, p. 48; ch. 289, p. 50; ch. 212, p. 52.
[4] C. C. Doc., 108–141.
[5] C. C. Doc., Report of Sale, 122, 124, 125, *129*, 133.

state surrendered to the United States and the United States received the full avails of all water-powers created by the improvement, the state reserving to itself nothing of the nature of property connected therewith, and retaining in the rivers no greater rights than were had prior to the passage of the land grant act of 1846.

The purchasers became incorporated as the Green Bay & Mississippi Canal Company, and caused to be transferred to the company the works of improvement and *water-powers*, all pursuant to legislative permission from the state and United States.[1] And the company so organized continued to hold the works of improvement in relations to the state and *trust relations* to the United States, the same in all respects as those in which they were held by the old company. About this time, 1866 and later, conventions for the consideration of the improvement of water-ways were being called in many parts of the country, north, south, east and west, several of which were held in Wisconsin, and Wisconsin water-ways, notably the Fox and Wisconsin rivers, were considered in nearly all of the conventions wheresoever held. The consensus of opinion was that the work of improving water-ways properly belonged to the United States, and congress was memorialized to make the necessary appropriations, and to give to the public the improved ways freed from toll and imports. So generally did this sentiment obtain that it became impossible for the new company to enlist capital in the enterprise of further enlarging and improving the rivers with a view to securing a fitting return therefor from increased revenues from tolls. This public movement culminated in the congressional act approved July 7, 1870, whereby the United States resumed its own and pledged itself to the further improvement of the navigation of the rivers after such enlarged plan as should be recommended by the chief of the bureau of engineers; and upon which, after a time, tolls were to be reduced to the least sum necessary to keep the improvements in repair. Section 2 of the act authorized the secretary of war to ascertain the sum which in justice ought to be paid to the Green Bay & Mississippi Canal Company as an equivalent for the transfer of

"all and singular its property and rights of property in and to the line of water-communication between the Wisconsin river, aforesaid, and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as in the judgment of such secretary should be needed;"

and to that end was authorized to join with said company in appointing a board of arbitrators, one of whom should be selected by the secretary, another by the company, and the

[1] C. C. Doc., p. 50, ch. 289, Laws 1861; p. 55, ch. 535, Laws 1865; p. 57, ch. 572, Laws 1866.

third by the two arbitrators so selected. In making their award, the arbitrators were required to take into consideration the amount of moneys realized from the sales of lands theretofore granted by congress to aid in the construction of such water communication, which amount should be deducted from the actual value thereof as found by the arbitrators.[1] Pursuant to this act, a hearing by the arbitrators, duly chosen, was had in November, 1871. Say the arbitrators in their report:[2]

"As a water channel it has and can have no value therefor, except in the future by becoming a part of a great through water route between the Mississippi river and Lake Michigan; a route, if once completed, of incalculable value to the people of all of the states east and west." * * * "If congress elects to take the improvement of the company, it is for the purpose of making it a part of that through route, and for that purpose only." * * * "And, therefore, it would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and decay." * * * "In other words, it is worth what it would cost congress to build anew, subject to the depreciation by wear and by time." * * *

In this view of the case, the board fixed the then value, less wear and decay, of all property of the company at $1,048,070, and the amount realized from land sales to be deducted therefrom at $723,070, leaving a balance of $325,000 to be paid to the company. And in anticipation that the secretary of war might decide that the personal property, and "the water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation," were not needed, these water-powers and the water-lots necessary to the enjoyment of the same, subject to all uses for navigation, etc., were valued at the sum of $140,000, personal property $40,000, and the improvement at $145,000.[3]

In reporting this award to congress[4] the secretary of war states: "It is deemed proper to inform congress that it is reliably stated to the secretary that the Green Bay & Mississippi Canal Company is dissatisfied with the foregoing award, and will contest its validity at law." This dissatisfaction arose from the fact that the total amount realized from land sales was deducted from the estimated value of the improvement, less wear and decay, and not from the actual cost of the improvement, shown to be in cash much over $2,000,000, and in securities a much larger sum. Whereas by the act as construed for the arbitrators by the attorney-general, they were to deduct the proceeds of land sales from the actual cost and not from the then present

[1] C. C. Doc., p. 60, ch. 210, Laws 1870.
[2] C. C. Doc., pp. 62–65 (bottom), 66, top 67.
[3] C. C. Doc., pp. 62, 67, 68.
[4] C. C. Doc., pp. 71–73.

value. And this also was the construction which this court subsequently gave to it.[1]

At the time of entering into the arbitration agreement, the company owned, absolutely, the right to toll the works of improvement and incidental water-powers, etc., the present value of which was fixed by the arbitrators at said sum of $1,048,070. Treating the water-powers as did the arbitrators in apportioning the said sum of $325,000 (and we think fairly), i. e., as being of about equal value with the improvement, or right to tolls, and the then present value of the water-powers was nearly one-half of this large sum, or $500,000, or basing the value upon actual cash cost, it was little less than one-half of the total cost, or say $1,000,000. True, the award of the arbitrators in a sum much less than this, thereafter, was reluctantly accepted by the company, but it was accepted because public opinion would not then tolerate the levying of tolls upon public waters, and without tolls there could be no return for moneys expended in enlarging the improvement. It was no longer possible to enlist capital in an enterprise the returns for which must be gathered from tolls to be levied in opposition to the public will.

And from this it appears that the United States has twice received the full avails of the sale of the water-powers. First, in receiving the sum realized therefor at the foreclosure sale in 1866, all of which went to the payment of state indebtedness and the sum necessary to complete the improvement, that is, to the cost of the improvement, a work then and always, excepting as to tolls, etc., belonging to the United States; and, second, in receiving in effect the sum at which in the arbitration proceedings the company was required to retain the powers, such sum being deducted from the sum otherwise awarded to the company. By these proceedings, the company, seized of a property which had cost in cash more than $2,000,000, and of the then present value of $1,048,070, was compelled to credit upon that value every dollar realized from land sales, viz., $723,000, and to receive the balance of $325,000 confessedly

[1] United States v. Jones, 109 U. S. 509, op. 514. Say the court:

"Under this act arbitrators were appointed, the value of the works ascertained and an award made, the amount of which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works and congress has made various appropriations to carry on and complete the improvement.

"The arbitrators in making their award proceeded upon the principle that the United States should pay for the works what their construction had cost the state, and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands."

due to the company, as follows: In cash, $145,000; in water-powers, $140,000, and in personal property, $40,000. So that in effect the United States received as a consideration for the water-powers $140,000 cash and one-half the proceeds of land sales, together amounting to about $500,000, or, if the actual cash cost of the improvement be considered, to about $1,000,000.

The secretary recommended to congress that it should take the works of improvement, and not the water-powers and the personal property. And the company, although dissatisfied, pursuant to the award, and the act of congress approved June 10, 1872, making appropriation therefor (ch. 416, Laws 1872), made to the United States its deed bearing date September 18, 1872, transferring the works of improvement, but reserving to itself the personal property and the water-powers in the language following:

> All that part of the franchises of said company, viz.: "The water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; all subject to the right to use the water for all purposes of navigation as the same is *reserved in leases heretofore made by said company*, a blank form of which attached to the said report of said arbitrators is now on file in the office of the secretary of war, and to which reference is here made; and subject, also, *to all leases, grants and assignments made by said company*, the said leases, etc., being also reserved herefrom."[1]

The powers at Kaukauna in question, and especially so far as they were then under lease by the Canal Company, were among the powers by such deed so reserved, and the leases of such powers were also thereby reserved.

By accepting and retaining this deed, and thereby extinguishing all rights of the company to tolls upon the improvement, the United States has assumed its own, and taken exclusive control of the rivers. It may toll the same under the franchise taken, or it may give use of the same to the public free of toll or impost.[2]

It is under obligations similar to those imposed upon the company, even to the maintenance of the improvement until final abandonment. The purchase of franchise and property was made with the assent of the state.[3] In the redemption of its pledge to make the improvement "a great through water route between the Mississippi and the Lakes,"[4] con-

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[1] C. C. Doc., pp. 62, 67, 68, 80, *83*, 84.
[2] Monongahela Navigation Co. v. United States, 148 U. S. 312.
[3] C. C. Doc., 62, ch. 416, Laws 1871.
[4] C. C. Doc., 60, 65, 66.

gress at once adopted plans for its enlargement contemplating

"for the Fox river the replacing of temporary structures with permanent works, the construction of new stone dams, and the widening and deepening of the channels throughout the river and canals to six feet depth and one hundred feet width, and for the Wisconsin river the construction of the channel by dams in order to give increased depth by concentration and scour."

The estimated cost for both rivers made in 1874 and 1876 was $3,745,663. A difference of opinion having arisen in the board of engineers as to the proper method of improving the Wisconsin river, the project for that river was for the time abandoned; but the method for the Fox river was adhered to. It is already apparent that the estimate of cost is inadequate. From about the time of purchase up to the close of the fiscal year ending June 30, 1889, including outstanding liabilities and $145,000 paid to the Green Bay & Mississippi Canal Company, the United States has expended thereon $2,754,873.13, and the appropriations made since 1889 added thereto aggregate a sum for the enlarged work nearly or quite equal to the estimated cost. The work now is recognized as one of the public works of the country and incorporated in the river and harbor bill for which yearly appropriations are made.[1]

The commerce now seeking this partly constructed channel is necessarily little or nothing. As a through channel it has no greater capacity than its capacity at its weakest point, and its weakest point, not opened even, is bad enough. But the declared purpose of the government is to provide a suitable and sufficient channel of water communication whereby the commerce of the Mississippi and its tributaries may be united with the commerce of the Great Lakes, each of which to-day is greater than the foreign commerce of the country, whether measured by tonnage or (omitting shipments of gold) by values.

When by the completion of the present plan, or an enlarged one, this unification shall be effected, it is believed that vessels will so shuttlecock through these waters that instead of utilizing for lockages in navigation one one-hundredth part of the flow of the river as now claimed, nearly the entire flow will be used, and there will be little surplus water wasting in front of the riparian owners' lands, and little surplus water for the Canal Company to use.

Utilization of surplus water began at the earliest demand therefor, the Canal Company making a lease as early as

[1] Appendix II of the Annual Report of the Chief of Engineers for 1889 to the Secretary of War.

1861,[1] and has extended, until now from one-quarter to one-half of the flow of the river is utilized at points near the first lock, a locality known by the company as the *lower end of the dam*. At this point the company has caused to be erected large and costly mills.[2]

The Canal Company makes claim of title to the exclusive right of use of *all surplus water incident to the improvement*, and to that only for such time as the same be not needed for navigation, and bases its claim *upon grant from the United States* made upon payment of the purchase-price twice over by the Canal Company. The grant is from the United States whether claimed under the trust-deed foreclosure sale, or claimed under the reservation in the deed from the Canal Company to the United States made in 1872, pursuant to the arbitrators' award. The reservation of water-powers made in such deed is a reservation of an easement in property of which the title is vested in the United States, and the easement is held by the Canal Company, in legal effect, the same as under a grant or patent from the United States.[3] The claim is to the *appropriated* waters of the river not needed for navigation. If, contrary to the Canal Company's contention, there be waters not appropriated to the improvement, no claim is made to them in this suit. Here the contention is restricted to the quantity of waters which may be appropriated by the United States without making compensation, the controversy being over the quantity appropriated, whether all or less than all. The argument made by opposing counsel (be their voluntary concession what it may) logically and necessarily restricts the quantity appropriated to those waters only which in fact are used in passing vessels; and this the court will recognize as the old contention disposed of in the Kaukauna

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[1] Pr. Rec., p. 365.

[2] Pr. Rec., p. 336.

[3] French v. Carhart, 1 N. Y. 96; Dand v. Kingscote, 6 Mees. & W. 197; Bowen v. Conner, 6 Cush. 132, 136, 137; Borst v. Empire, 5 N. Y. 33, 39; Everett v. Dockery, 7 Jones (N. C.) L. 390; Whitaker v. Brown, 46 Pa. St. 197.

In Fisher v. Laack et al., 76 Wis. 313-320, the court say: "The court will always determine from the nature and effect of the provision itself whether it creates an exception or a reservation. Stockwell v. Couillard, 129 Mass. 231; 7 Am. & Eng. Ency. of Law, 113, and cases cited. The distinction between these terms is thus stated in 1 Sheppard's Touchstone, 80: 'A reservation is a clause of a deed whereby the * * * grantor doth reserve some new thing to himself out of that which he granted before. * * * This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before.' Hence it was said in Rich v. Zeilsdorff, 22 Wis. 544, that 'a reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all.'"

cases, state and federal, and wherein the courts hold that the Canal Company owns the right of use of the surplus waters not needed for navigation; that is, the use of all waters of the river *at the points covered by that litigation.*

Against this claim of title the Water Power Company *asserts a claim of title* based upon the following facts:[1] On the south shore opposite the Kaukauna Rapids, French claims, so-called, were run out and surveyed into lots under an early act of congress, passed to quiet title to unsurveyed lands. Squatters upon the lands, coming from French settlements in Canada, had made these claims after the custom of that country. These on the south shore at Kaukauna were claims having a narrow frontage upon the river, thirteen to the mile, or less than twenty-five rods of frontage each, and extending back a great distance, not unfrequently a mile or more.[2] The cabins were located all upon the river bank so as to have access to the river for boating, fishing, and as a highway between cabins located on either bank. Had an attempt been made by any squatter on any of these claims to utilize the power opposite his premises, assuming his right to do so, it would have been largely ineffectual, inasmuch as the fall was not sufficient to create a power of much practical use for hydraulic purposes. It was not until the ownership of the claims in question became vested in the present claimants or their trustee, that it became practicable to utilize the fall in the river opposite the same for any considerable useful purpose. In few cases apparently were the squatters able to enter the lots when surveyed. The lots for the most part were patented about 1837, although entered in 1836 and several in 1835, and appear to have been entered several by a single entryman. It was not, however, until between 1871 and 1878 that one Frisbie, apparently acting as agent or trustee for parties subsequently becoming incorporators of the Kaukauna Water Power Company, gathered up the title to most of them, and in about 1880 or 1881 caused it to be transferred to the Water Power Company. It was in 1881, twenty-six years after the dam was completed, that the Kaukauna Company asserted the first claim publicly made to riparian rights on the south bank (save possibly an old government mill used for the Indians), by constructing a water-power canal tapping the pond above the dam, the use of which was enjoined by this and the state court. It was after the construction of the canal, begun in 1881, that the mills were builded there at large cost, but mills and canal were builded and constructed with full knowledge of the Canal Company's claim of title and after service of written notice to desist.

[1] Pr. Rec., pp. 496–498.

[2] See map attached.

The Legislative Source of Title or Grant.—The Canal Company's title so far as it is based on legislation, the act of 1848 and the grant of 1853, and on foreclosure proceedings against the Fox & Wisconsin Improvement Company, is admitted (Pr. Rec., p. 335) as follows: "It is admitted that the Green Bay & Mississippi Canal Company has succeeded to the title of the state and of the Fox & Wisconsin Improvement Company as to the work of improvement and all the hydraulic power which the state or Fox & Wisconsin Improvement Company owned." Section 16, act of 1848, declares that "whenever a water-power shall be created by reason of any dam erected or other improvements made on any of such rivers, *such water-power* shall belong to the state, subject to future action of the legislature." That such title was the title of the United States to property held in trust by the state, and that the state in making such grant acted vicariously for the United States, is, we think, as conclusively shown. As early as 1787, the general government, representing the "original states," entered into articles of compact with the people and states of the territory northwest of the Ohio, whereby and by the ordinance of congress then made, the Mississippi and St. Lawrence rivers, and the carrying places between the same, were dedicated to the public and declared to be common highways and forever free. In all of the congressional legislation aiding or looking to the admission of Wisconsin into the Union as a state, and in the constitution, and subsequent legislation of Wisconsin, the same dedication to the public and the same declaration thereof are made. The Fox and Wisconsin rivers both have been held by this court and the state supreme court to be public waters of the United States over which the jurisdiction of the United States extends. (See cases cited on page 62, note 6, of this brief.) In further recognition of United States ownership of those waters, congress passed the act approved August 8, 1846, granting lands to Wisconsin to aid in improving the navigation of the Fox and Wisconsin rivers, wherein it again declared that "*the said rivers, when improved, and the said canal*" (connecting the rivers), "*when finished*, shall be and forever remain a *public highway for the use of the government of the United States free*,"

etc., and in and by said act did specially *authorize and empower* the state "to adopt such *kind and plan of improvement on* such route as the legislature shall from time to time determine for the best interest of said state."

The state upon its admission into the Union, June 29, 1848, accepted the grant and assumed the trust subject to the conditions imposed; but by the very constitution under which it was admitted into the union of states, it was restrained from assuming any pecuniary liability respecting the work of improvement;—it being thereby prohibited from engaging in works of internal improvement, and permitted only to aid in carrying on such works by applying thereto the proceeds of the sale of lands granted therefor. And the first legislature of the state by which this grant was accepted, passed the act of 1848, known as the Board of Public Works Act, section 1 of which describes the improvement to be a work contemplated by congress, namely:

"Section 1. The construction of the *improvement contemplated by the act of congress, entitled 'An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal'* in the territory of Wisconsin, approved August 8, 1846, and the superintendence and repair thereof after the completion, shall be under the direction and control of a board of public works."

Thereupon the Board of Public Works adopted a plan for the improvement, which, though subsequently enlarged, was carried out, and as enlarged is the improvement as now constructed, including as an integral part thereof the dam with its cross-section and extension down stream as hereinbefore described. Congress later made other grants of land in aid of the same work, the proceeds of which were by the state applied to the construction thereof. Still later, congress acquired from the Canal Company a transfer of its property and rights of property in the works of improvement so constructed, for the purpose of again enlarging and extending the same, and making it as extended a through channel of commerce connecting the Mississippi with the Great Lakes; a work now undertaken by congress *only on*

the theory that it is a work for the improvement of navigable waters of the United States. It was not a state work, for the state by its constitution was inhibited from engaging in works of such kind, and necessarily, therefore, from the outset was a work of the United States and is now held as such by the United States. Whatever property and property rights were acquired by the state, be they what they may, were so acquired. And, so far as capable of disposition, were disposed of by the state acting as the trustee of the United States. The underlying title to the work as a channel of commerce not being the subject of grant, and wholly incapable of disposition by the United States, was at all times necessarily one remaining in the United States.

The Canal Company's ownership of title, so far as it rests on legislative grant, covering with other rights all right to toll the commerce on the improvement, and the right to use the surplus waters for power, etc., is, we think, clearly a title emanating from the United States. That the water-powers at Kaukauna in controversy, including the right to use for power the water of the pond by drawing it from the canal or dam extension, so called, and discharging it into the North channel at the place where the Canal Company has heretofore been using the same, were a part of the water-powers acquired by the Canal Company under such grant, appears from the record, as we contend, and these powers to some extent have been in use at this particular place for nearly forty years, as far back as 1861 (Pr. Rec., p. 365), about a quarter of a century, more or less, prior to the making, so far as we are advised, of any claim to ownership of power by riparian owners of the south bank of the river.

Title Based on the Reservation of an Easement in the Canal Company's Deed from the United States. — Whatever may have been the character of the Canal Company's title or interest in the work of improvement, especially in the water-powers created thereby, prior to the transfer made in 1872 to the United States, whether an easement or a broader claim of title, nevertheless, since then the com-

pany's interest in such water-powers has been and is, we think, only that of an easement in property owned by the United States.

In execution of an agreement made between the United States and the Canal Company at the foot of arbitration proceedings had pursuant to acts of congress, approved July 7, 1870 (ch. 210, Laws of 1870), and June 10, 1872 (ch. 416, Laws of 1872), the Canal Company made its deed of transfer, bearing date September 18, 1872, whereby it transferred to the United States

"all and singular, its property and *rights of property* in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its *locks, dams, canals and franchises*, saving and excepting therefrom, *and reserving* to the said party of the first part, the following described property, rights and portions of franchises, which, in the opinion of the secretary of war and of congress, are not needed for public use, to wit: First. * * * Second. Also all that part of the franchises of said company, viz., *the water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation*, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; *all subject* to the right to use the water for all purposes of navigation, as the same *is reserved in leases heretofore made by said company*, a blank form of which attached to the said report of said arbitrators, is now on file in the office of the secretary of war, and to which reference is here made, and subject, also, to all *leases, grants and easements made by said company*, the said leases, etc., being also reserved herefrom."

By this deed full title to the entire property, water channel and work of improvement, not already theretofore vested in the United States, became vested therein, subject to a reservation of the water-powers created thereby and thereon, saving only the title to certain lots and pieces of land necessary to the use of the powers. These lots are not the lands or real property on which the powers are created or on which they lie, but are the mere places designed for the use of the powers. The lands on which they lie extend up and down the stream for a long distance. Chief Justice Gibson (*supra*) defines water-power to consist "*of the fall in the stream when in its natural state* as it passes through his land or along the boundary of it; or, in other words, *it consists of the difference of level* between the surface where the stream touches his land and the surface where it leaves it." The water-powers created on lands so extending up and down the stream are not separated in the deed from the

channel of commerce property. The real property included in the designation "work of improvement" is the same real property largely as that upon which the "water-powers" are created. There is no separation made or attempted by which the water-power property is distinguished and separated from the channel of commerce property, and clearly enough none can be made. The dams, canals, etc., were by special designation transferred to the United States, and the United States took possession and control of the same. It is alleged in the Water Power Company's answer to the complaint (Pr. Rec., p. 134, line 46, and p. 136, line 28) that the *United States owns* the canal and the embankment from and through which at Kaukauna the waters for power use are drawn. It follows, we think, that the company's title or interest in the water-powers is that of an easement in property held and owned by the United States, for, on receiving the deed, the United States became vested with full and complete title to the entire property, upon which is created by its own consent, shown by the acceptance of the deed, the easement in favor of the Canal Company. It is not a title or interest excepted from the property transferred, for there is no line of separation indicated, nor could one be indicated by which the estate excepted is separated and distinguished from the estate transferred. *It is a new estate or interest created by the deed.* It is an estate or interest which the Canal Company could not have created in its own favor prior to the deed, while all or much of the property was vested in itself; for an easement on property merges in the title to the property when both are in one and the same ownership. It could only be created by the deed with the assent of the United States, as shown by its acceptance of the deed. It was part of the property transferred, and is carved out therefrom by the assent and act of the United States on the vesting of the estate transferred. Say the Wisconsin supreme court in Fisher v. Laack et al. (76 Wis. 313–320):

"The court will always determine from the nature and effect of the provision itself whether it creates an exception

or a reservation. Stockwell v. Couillard, 129 Mass. 231; 7 Am. & Eng. Ency. of Law, 113, and cases cited. The distinction between these terms is thus stated in 1 Sheppard's Touchstone, 80: 'A reservation is a clause of a deed whereby the * * * grantor doth reserve some new thing to himself out of that which he granted before. * * * This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before. Hence it was said in Rich v. Zeilsdorff, 22 Wis. 544, that 'a reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all.'"

See, also, Washburn on Easements, 3d ed., p. 6; p. 8 (3–5), p. 10 (2) and p. 29 (5).

The reservation is in all respects the same in legal effect as a patent from the United States. In French v. Carhart, 1 N. Y. (Court of Appeals), p. 96, op. 103, the court say:

"This reservation should be construed in the same way as a grant by the owner of the soil of a like privilege; for the rule is, that what will pass by words in a grant will be excepted by the same words in an exception. (Sheppard's Touchstone, 100; 1 Saunders, 326, n. 6; Doud v. Kingscote, 6 Mees. and Wels. 197; Hinchliffe v. Kennard, 5 Bing. N. C.)."

And in Borst v. Empie, 5 N. Y. (Court of Appeals), 33–38:

"For a reservation is always of something issuing or coming out of the thing or property granted, and not a part of the thing itself, and to be good, it must always be to the grantor, or party executing it, and not to a stranger to the deed. (1 Preston's Shep. Touch. 80.)"

That this reservation of water-powers covers the powers on the dam extension or government canal is beyond question, as appears from the record. The language of the reservation is, "the water-powers created by the dams, etc., all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company; * * * and subject also to all leases, grants and easements made by said company, the said leases being also reserved herefrom."

And from the record (Pr. Rec., p. 365), it appears that at least two leases at this place had been made by the company prior thereto. And that these powers were reserved also appears from the foreclosure judgment and report of sale

thereunder. It is submitted that the Canal Company, as such reservee under said deed, became in effect the grantee of the United States of an easement upon the property of the United States consisting of the right of use of the water-powers in question. And this brings us to the last proposition.

The Rights Acquired Under Arbitration Proceedings.— For the facts on which these rights rest, see statement, pp. 61, 71 of this argument. It is there stated that a large amount of money in excess of two millions of dollars had been expended upon the works of improvement then owned by the Canal Company so far as capable of private ownership, of which sum the government contributed as the proceeds of land sales the sum of $723,070. The act of congress (approved July 7, 1870, ch. 210, Laws of 1870, Canal Co. Doc., p. 60), providing for arbitration proceedings, required in substance (sec. 2) that the arbitrators should ascertain "the sum *which ought in justice* to be paid to the Green Bay & Mississippi Canal Company * * * as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river including its locks, dams, canals and franchises," etc., * * * "*provided* that in making their award the said arbitrators shall take into consideration the *amount of money* realized from the sale of lands heretofore granted by congress to the state of Wisconsin to aid in the construction of said water communication, *which amount shall be deducted from the actual value thereof as found by said arbitrators.*"

The effect upon the body of the section to be given to the proviso determines the rule to control the arbitrators in making their award. If it was the intention that the sum referred to in the proviso as the "actual value of the work" is one and the same with the sum referred to in the body of the section as that "which ought in justice to be paid," then the requirement to deduct therefrom the amount of money realized from land sales became an act of injustice. To deduct any sum whatever "from the sum which ought in justice to be paid" is an act of injustice so obvious that

it is not to be presumed that such was the intention of congress. It may be that the sum referred to in the body of the section as that "which ought in justice to be paid" is restricted by the proviso so far that it cannot exceed the balance after deducting the amount of land sales from the "actual value" of the work. But, on the other hand, it follows, we think, that the clause requiring the arbitrators to deduct the full amount of land sales, that is, to deduct the full amount of that part of the joint expenditure which the government put into the work, also requires the arbitrators to leave to the companies the full amount of their part of the joint expenditure, so that the "actual value" to be found by the arbitrators may be more, *but cannot be less*, than the sum total of the expenditures up to that time made by the government and the companies. It is apparent that some restriction attaches to the amount designated as the "actual value." If there were no restriction, it would be possible for unwise or unjust arbitrators to fix that amount at a sum less than the amount of land sales, in which event the balance of the proviso would be inoperative, because the requirement is, that the amount of land sales shall be *deducted*, evidently from some greater amount; and the body of the section would be inoperative because it proceeds upon the theory that there *is* a sum which in justice ought to be paid to the company; and by the proposed deduction there would be left no sum whatever but an obligation on the part of the company to pay a balance to the government. The restriction which attaches to the phrase "actual value" is not simply that the "actual value" cannot be less than land sales, but is broader, namely, that it cannot be less than the joint expenditures up to that time. The moneys realized from the sale of land were from time to time applied to the work during its entire progress conjointly with the moneys applied thereto by the companies. If the "actual value" of the work was less than the joint expenditures, it would follow that the interest in the work resulting from the expenditures made by the government would be less in value than the amount of such expenditures. So that the clause

requiring the arbitrators to deduct the *full amount* of land sales would become a direction to them to credit the government with an interest in the work greater than that resulting from its expenditures, and with some portion of the interest in the work resulting from the expenditures made by the companies, which would be a taking of the company's property as unjust as any other mode of taking property for which there is no right. And hence it follows, we think, that the award should be the cost of the work less proceeds of land sales and wear and decay.

Say this court, speaking of the theory of the award (United States v. Jones, 109 U. S. 513, op. 514):

"Under this act arbitrators were appointed, the value of the works ascertained, and an award made, the amount of which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works, and congress has made various appropriations to carry on and complete the improvement.

"The arbitrators, in making their award, proceeded upon the principle *that the United States should pay for the works what their construction had cost* the state and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands."

Whether the arbitrators followed this theory or statutory rule in making their award or not, is at this time not the question. The award, so far as it fixed a sum of money for payment, was accepted; but this review of the statute determines the theory of the award and its interpretation.

By their report and award, the arbitrators "fixed the then value, less wear and decay, of all the property of the company at $1,048,070, and the amount realized from land sales *to be deducted therefrom* at $723,070, leaving a balance of $325,000 to be paid to the company, and in anticipation that the secretary of war might decide that the personal property, and 'the water-powers created by the dams and by the use of the surplus waters not required for the purposes of navigation,' were not needed, valued these water-powers and the water-lots necessary to the enjoyment of the same, subject to all uses for navigation, etc., at the sum of $140,000, personal property $40,000, and the improvement at $145,000.

At the time of entering into the arbitration agreement the

company owned, absolutely, the right to toll the works of improvement and incidental water-powers, etc., the present value of which was fixed by the arbitrators at said sum of $1,048,070. Treating the water-powers as did the arbitrators in apportioning the said sum of $325,000 (and we think fairly), i. e., as being of about equal value with the improvement, or right to tolls, and the then present value of the water-powers was *nearly one-half* of this large sum, or $500,000, or basing the value upon actual cash cost, it was little less than one-half of the total cost, or say $1,000,000.

By these proceedings the company seized of a property which had cost in cash more than $2,000,000, and of the then present value of $1,048,070, was compelled to credit upon that value every dollar realized from land sales, viz., $723,070, and to receive the balance of $325,000 confessedly due to the company, as follows: In cash, $145,000; in water powers, $140,000, and in personal property $40,000. So that in effect the United States received as a consideration for the water-powers $140,000 cash and the equivalent of one-half the proceeds of land sales, together exceeding the sum of $500,000." At least this is the loss to the Canal Company.

It is this large sum which was the consideration price paid by the Canal Company for the *grant to it by way of easement* of the water-powers created by the improvement, and which was made by the United States in its (the Canal Company's) deed *to* the United States.

The judgment under review takes from the Canal Company a large portion of the water-powers thereby acquired, and the identical Kaukauna powers in question, as appears from the language of the reservation itself, to which attention has already been called. Assuming that this judgment of deprivation may stand, the question naturally arises as to the nature and extent of the obligation to the company, if any, which thereby is or may be imposed upon the United States. Without pursuing the inquiry, it is apparent that the United States is directly interested in and affected by the judgment under review.

Unquestionably the United States is a necessary party to any suit affecting its rights under conveyances and contracts made by it, and is a necessary party to any suit affecting the inflow and discharge of waters from the government

canal in his charge. Should the Secretary cause or permit the waters of the river to be wasted down the canal through the locks and waste weirs, would such action be a violation of the judgment under review? Would his decision that such waste of waters was necessary to subserve public interests be subject to review by the state court? If he may do this, in any measure, may there not be surplus waters not needed for navigation which under the grant and reservation in question the Canal Company may use?

It appears that by virtue of the legislative grant made vicariously for the United States, the reservation of easement and arbitration proceedings, transactions made directly with the United States, the Canal Company has a title or right to property, claimed under the United States, or under a commission or authority exercised under the United States, and of which by the judgment under review it has been deprived. The state in its grant, and the United States officials in accepting the deed in question, each were exercising an authority under the United States, and the judgment in question, made in the exercise of an authority under the state, is against the title or right so acquired and claimed, and is in violation of the fourteenth amendment to the constitution of the United States. These claims of title or right were specially set up and claimed in the Canal Company's counterclaim.

The violated clauses of the constitution are not stated in the record, nor is it required that they be so stated. In the Kaukauna case the court say:

"This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court." (142 U. S. 254–269, and 1 Wall. op. 142.)

Nor could they be so stated, as the repugnancy to the constitution was first disclosed in the decision of the supreme court, directing entry of judgment in the superior court, and in the judgment so entered. The Canal Company could not have anticipated that the court would de-

cide against the validity of the title or right so set up and claimed under an authority exercised under the United States. In the case of Virginia v. Rives, say the court:

"Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly, until then he cannot affirm that it is denied or that he cannot enforce it in the judicial tribunals." (100 U. S. 313, op. 319; 96 U. S. 432, op. 441.)

It is in the supreme court that the federal question first arose, too late to incorporate a claim of repugnancy in the record, and too late to call attention thereto in the state court other than by the argument of counsel, and argument of counsel is held not to be a part of the record. (158 U. S. op. 183.)

It is submitted that federal questions arise in the case, and that the judgment is for review in this court.

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